Central Law Journal.

ST. LOUIS, MO., MARCH 23, 1900.

An exchange calls attention to a curious case in the law regarding accident insurance recently decided by Judge Wheeler, of Vermont, sitting in the United States Circuit Court at New York. It appeared that the deceased was insured against "bodily injury sustained through external, violent and accidental means." His death was caused by hard, pointed masses of food which perforated the intestines. Judge Wheeler holds that this was an accidental injury within the meaning of the policy. The food, he says, was merely placed where it accidentally caused the injury. "If an accident, that persons of ordinary strength would stand should kill a weak person, or a person of ordinary strength at a weak place, the accident, and not the weakness, should be said to have killed." In Illinois it has been held that taking poison by mistake is to be deemed an accident, under a similar insurance clause.

McAnnally v. Pennsylvania R. R., 45 Atl. Rep. 326, is an exceedingly novel and somewhat ludicrous case in the law pertaining to railroad casualties. It appeared that the defendant railroad company maintained safety gates at its railroad crossing of a public street, and that plaintiff, intending to cross the tracks, entered upon the space between the safety gates and the nearest rail before the gates were lowered for an approaching train. The distance from the gates to the rail was about eight feet. When he came within six inches of the rail he saw a freight train approaching from the east. The gates having been in the meantime lowered, he stepped back, but remained close to the track. On his disregarding the call of the gateman to get back, the latter sought by force to compel him to get back, and he, resisting, was, in the struggle, thrown and had his leg cut off by the train. The Supreme Court of Pennsylvania held, two judges dissenting, that the proximate cause of the injury was the plaintiff's resistance, so that he was properly non-suited.

The decision of the Illinois Supreme Court, holding unconstitutional an enactment of that State directed at so-called "department stores" to which we called attention in a recent issue,—50 Cent. L. J. 41—has been followed by a similar ruling by the Supreme Court of Missouri, which has held invalid the act providing for the taxation of department stores. State of Missouri v. Ashbrook. Judge Robinson who speaks for the court holds that the law is unconstitutional and void if for no other reason than uncertainty of language. He says further that "independent of all these objections to the form and structure of the act, to the mode, manner and amount of the attempted imposition, or as to whether the imposition is to be treated as a tax or a license, the act is further assailed upon the broad constitutional ground that, as unwarranted class legislation, it is violative of the natural rights of the citizens defined in section 4 of article 2 of our constitution, which declares that all persons have a natural right to life, liberty and the enjoyment of the gains of their industry, and of section 30 of the same article, which declares that no person shall be deprived of life, liberty or property without due process of law."

Judge Robinson, in summing up his decision and conclusions in declaring the law unconstitutional, says: "No reason has been given or suggested, and to our minds none can be conceived, why the arbitrary selection of persons and corporations having or exposing for sale, in the same store or building under a unit of management or superintendency at retail in the cities of the State having a population of 50,000 inhabitants, any articles of goods, wares or merchandise, set out and named in section 1 of the act in question, of more than one of the several classifications or groups therein designated, wherein fifteen or more persons are employed, was named or made, for the imposition of the license fee provided in the act, from which all other persons and merchants in the State are exempt. It is classified wholly without reason or necessity. It is so arbitrary and unreasonable as to defy suggestion to the contrary. This simple statement of its creation is a most fatal blow to its continued existence. It is truly classification run wild. It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois, or those employing clerks of a designated stature, or to those doing business in build-

ings of a special architectural design, would have been as natural and as reasonable a classification for the purpose in view, as the classification made by this act." All of the judges concur in the opinion.

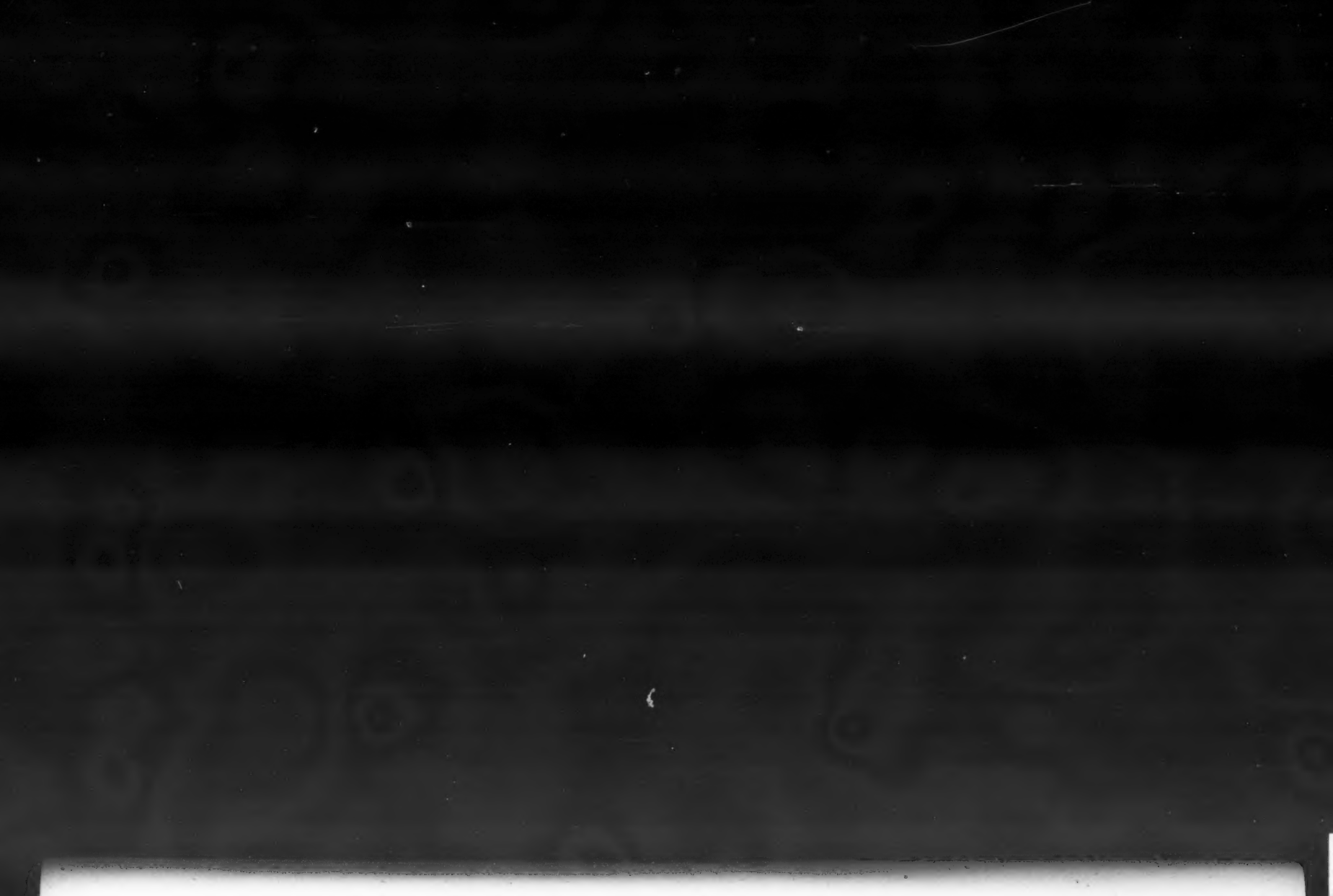
NOTES OF IMPORTANT DECISIONS.

HUSBAND AND WIFE—ACTION FOR ALIENATING HUSBAND'S AFFECTIONS.—It is held by the United States Circuit Court, District of Massachusetts, in the case of Crocker v. Crocker, that a wife cannot, under the laws of Massachusetts, maintain an action against a third person for merely alienating the affections of her husband. The court says:

"This action was brought by a wife for the alienation of the affections of her husband. There is no charge in the declaration of criminal conversation, and the identity of the surnames of the parties suggests that the case may be one of a class of which Hutcheson v. Peck, 5 Johns. 196, is an example. If so, the ultimate determination of the suit, if it can be maintained at all, would involve much careful consideration. Hutcheson v. Peck was brought by the husband against his wife's father for loss of *consortium*, and Kent, then chief justice, says in his opinion, that in a suit of that nature between such parties the verdict should be for the defendant, unless he had been actuated by improper motives. At common law, at the time the wife was regarded, for many purposes, if not essentially, as a servant of the husband, actions of this character were maintained on such broad rules that it was hazardous for a stranger to assist the wife, even in case of sudden, actual stress. The later views of the law, however, yielding to the principles of modern civilization, together with the urgent necessity of securing freedom of individual action, and the admitted fact that actions of tort will not lie merely for sentimental injuries, unaccompanied by any act unlawful in itself, make it the more difficult to maintain any suit of the character of the case at bar without specific proof that the defendant was actuated by improper motives. Passing by this, and coming to the question whether or not an action of this class will lie in a jurisdiction where modern legislation permits a married woman to maintain actions for torts as if sole, there has been so much discussion whether a married woman may maintain such a suit as, under reverse circumstances, the husband may admittedly do since Winsmore v. Greenbank, Willes, 577, decided in 1745, that we think we could not add anything by a protracted opinion. Moreover, the necessity of this is, we think, obviated by the evident leaning of the Supreme Judicial Court of Massachusetts against the maintenance of a suit of this character, as shown by the decisions which have been cited to us. We therefore will only undertake to point out the peculiar history of the law from which flows the result which we have reached.

"Poll. Torts (4th Ed.), than which there is no higher authority, at page 209, observes, in reference to the general topic, as follows: 'There seems, in short, no reason why this class of wrongs should not be treated by the common law in a fairly simple and rational manner, and with results generally not much unalike those we actually find, only free from the anomalies and injustice which flow from disguising real analogies under transparent, but cumbrous, fictions. But, as a matter of history,—and pretty modern history,—the development of the law has been strangely halting and one-sided.'

"It follows, therefore, that the law applicable to this suit cannot be worked out philosophically, and we must look to its history. This is given with sufficient fullness by Mr. Pollock, at pages 208 to 212, to render it unnecessary to attempt to add anything to what is there stated. It will be seen that the common law gives the husband three different suits arising out of three different classes of circumstances. One is that '*per quod consortium amisit*,' arising out of a physical injury done the wife by trespass. The development of the law led to including in this class of cases of injury to the wife's person arising from mere negligence. The next class of cases consists of those commonly known as actions of 'criminal conversation.' The basis of this is trespass *vi et armis*, on the theory that the wife is not a free agent or separate person, and that, therefore, her consent is immaterial, so that the adulterer is pursued as a mere trespasser. The inapplicability of this class of actions as a remedy for a wrong complained of by the wife is at once apparent when it is remembered that it lies at common law, in behalf of the husband, even though the wife may be the actual seducer. The third class, as shown by Mr. Pollock at page 212, includes, theoretically, actions for enticing away servants, and originated either at the common law or under the statute of laborers (23 Edw. III., A. D. 1349), as to which Mr. Pollock seems to be doubtful. This Mr. Pollock makes the basis of the action for merely persuading or enticing the wife to live separately from her husband without sufficient cause; but it is with this class that Hutcheson v. Peck, and also the suit at bar, if it can be maintained, must stand. In Lynch v. Knight, 9 H. L. Cas. 577, the proposition came up practically as a moot question. It was contended that, if there were some illegal act,—in that case a slander,—which is recognized by the law as laying the basis of an action, the wife might recover, in connection with it, for the loss of the *consortium* of her husband; but the case apparently went off on the ground that the loss of *consortium* was not, in that instance, the natural and reasonable consequence of the slander. In the course of the opinion of Lord Campbell, which was read by Lord Brougham after the death of Lord Campbell, the view is expressed that, in-



dependently of any peculiar basis for a suit, the wife stood with practically the same rights of action as the husband; but Lord Wensleydale, who, as compared with Lord Campbell, must be regarded as the correct lawyer, shows that there was no foundation for such an action in the principles of the common law. The result of all the opinions was practically expressed in the syllabus as follows: '*Quære:* Whether a wife can maintain an action against a third person for words occasioning to her the loss of the *consortium* of the husband?' The law in England has not progressed beyond this. Eversley, in the Law of the Domestic Relations (2d Ed. 1896), so far as we can discover, neither makes any mention of Lynch v. Knight, nor of the topic which this case involves. Lush, Husb. & W. (2d Ed. 1896), at page 10, says as follows: 'If it be correct that the husband might recover damages in certain cases for an injury to the wife, there seems to be no good reason why a wife should not, under similar circumstances, sue for an injury to her husband inflicting consequential damages upon herself.' This, however, does not attempt to state any rule of law, and the furthest that the author goes when he assumes to do this is as follows: 'It is conceived, therefore, that a wife could now recover damages for a libel concerning herself whereby she loses the *consortium* of her husband, though in the previous state of the law relating to married women it was considered doubtful whether such an action would lie.' The pith of this statement, even if sustained by the English authorities, is that, if the wife has, as the basis of an action, some other matter which the law recognizes as such, she may include in the damages to be awarded the loss of *consortium* of her husband, if it is a natural and reasonable consequence of the injury for which the law gives her a remedy. We are left, therefore so far as the common law is concerned, with the statement of it as given by Mr. Pollock, according to which each class of actions by the husband is based on some principle of law peculiarly applicable to him, affording no analogy out of which the present suit can spring. At the common law, as we have already said, the husband had an action for a trespass committed on the person of the wife, and for the consequences of a negligent act through which the wife suffered personal injury; but, even in those jurisdictions where the wife has been given a sole cause of action for tort, it has been found necessary to apply to the legislature before a like action could be given her, even for the maiming of the husband, through which her pecuniary support, to which she has been accustomed, might be taken away. We believe that, so far as we can read the views of the Supreme Judicial Court of Massachusetts,—which would guide us in this case if positively expressed,—the relief to be obtained by the wife in actions of this nature in this State must originate from the same source."

LIBEL — PRIVILEGED COMMUNICATION.—In Nichols v. Eaton, 81 N. W. Rep. 792, decided by the Supreme Court of Iowa, it was held that a communication by a life insurance company to its soliciting agent with relation to an alleged forgery by an examining physician of the signature to an application for insurance, and informing him that another physician would be appointed to make examinations, being upon a subject relating to the agency, and in respect to which there is a mutual interest, is a privileged occasion. It was further held that in an action for libel, based upon a communication that is privileged, the question whether there is such excess of statement in the communication as to constitute evidence of malice is for the jury. The court said in part:

"Appellant is a life insurance association incorporated under the laws of Iowa, with its principal place of business at Des Moines. Defendant Eaton was its medical director, and one Dohaney was its clerk and book-keeper. W. T. Botts was soliciting agent for the association at the town of Higbee, Mo., and plaintiff was its medical examiner at that place. The application of one A. P. Milnes for insurance was prepared by plaintiff, signed by the applicant, and turned over to the soliciting agent, Botts, after plaintiff had examined Milnes. The application was then forwarded to the defendant company. After being received by the association, it was given to the medical director, Eaton, who made some minutes thereon, and passed it to Mr. Dohaney, to prepare and forward an answer. Dohaney prepared, addressed and mailed the following to Botts, the soliciting agent: 'Des Moines, Iowa, January 11, 1896. W. T. Botts, Higbee, Mo.—Dear Sir: I write you in reference to medical examiner at Higbee. I have before me the application of Adolphus D. Milnes. This application shows on the face of it to be a forgery of his signature, and it is written by Dr. Nichols instead of the applicant. He has fallen down in his undertaking to imitate the handwriting of the applicant by his misspelling the name. We have returned the application to the doctor, and given him to understand that it must be corrected at once; and you are hereby notified that in the future no more examinations will be accepted when made by Dr. Nichols. We will appoint another physician at that place, and will notify you of the appointment of same. We have no longer any confidence in Dr. Nichols, and, as above stated, we cannot accept any more examinations made by him. Very respectfully yours, Chas. Woodhull Eaton, Medical Director.'

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"The occasion was undoubtedly privileged, and it was the duty of the court to so instruct the jury. Appellee says that, conceding the occasion was privileged, defendant went beyond the privilege, and rendered itself liable. This argument presents a question that is new to this court, and one on which the authorities are in apparent conflict. Decision of the point involves a consideration of the reasons underlying the doctrine of privilege. Ordinarily, proof of a defamatory publication, charging another with the commission of a crime, makes out a *prima facie* case of malice in the

author. But a privileged communication is an exception to the rule. In such case the presumption of malice is rebutted, and the burden of proving the existence of this element of the action is on plaintiff. In other words, actual malice must be shown. White v. Nicholls, 3 How. 286, 11 L. Ed. 591; Briggs v. Garrett, 111 Pa. St. 414, 2 Atl. Rep. 813; Bearce v. Bass, 88 Me. 521, 34 Atl. Rep. 411. Bacon v. Railroad Co. (Mich.), 33 N. W. Rep. 181, is an instructive and well-considered case on this point. It is there said: 'The meaning in law of a privileged communication is that it is made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of plaintiff, and throws on him the *onus* of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. * * * The effect, therefore, of showing that the communication was made on a privileged occasion is *prima facie* to rebut the quality or element of malice, and casts upon the plaintiff the necessity of showing malice in fact (that is, that the defendant was actuated by ill will in what he did and said, with a design to causelessly or wantonly injure the plaintiff); and this malice in fact, resting, as it must, upon the libelous matter itself, and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury.'

"Plaintiff relies on some expressions found in the books to the effect that, if the communication exceeds the privilege, it destroys the privilege. Thus, Mr. Odger, in his work on Slander and Libel (page 197), says: 'But it must be remembered that, although the occasion may be privileged, it is not every communication made on such occasion that is privileged. "It is not enough to have an interest or duty in making the communication. The interest or duty must be shown to exist, in making the communication complained of." Per Dowse, B., in 6 L. R. Ir. at p. 269. A communication which goes beyond the occasion exceeds the privilege.' Again, at page 245, it is said: 'So, too, in making a communication which is only privileged by reason of its being made to a person interested in the subject-matter thereof, the defendant must be careful not to branch out onto extraneous matter with which such person is unconcerned. The privilege only extends to that portion of the communication in respect of which the parties have a common interest or duty.' We have recognized some of the rules here announced. See State v. Hoskins (Iowa), 80 N. W. Rep. 1063. There the occasion was not privileged, because made to persons who were in no manner interested in the publication. The doctrines announced by Mr. Odgers, some of which are even stronger than we have quoted, have produced some confusion in the authorities; and we think the better rule is that if the occasion is privileged, and the publication is about a matter in which both parties have an interest, excess of statement is material only as bearing on the question of malice. Indeed, the jury may find the existence of malice from the language of the communication itself, as well as from extrinsic evidence. Hastings v. Lusk, 22 Wend. 410-421; Neville v. Ins. Co. (1895), 2 Q. B. 156; Railway Co. v. Behee (Tex. Civ. App.), 21 S. W. Rep. 384. Whether the publication is or is not privileged by reason of the occasion, is a question of law for the judge alone, where there is no dispute as to the circumstances under which it was made. If the judge decides that the occasion was one of qualified or conditional privilege only, the plaintiff must then, if he can, give evidence of actual malice on the part of the defendant. If he does give any evidence which, as we have said, may be gathered from the publication itself, the question of *bona fides* becomes one of fact for the jury. 1 Am. Lead. Cas. (5th Ed.), 193; Gray v. Pentland, 4 Serg. & R. 420; Hart v. Reed, 1 B. Mon. 166; Newell, Sland. & L., p. 478. In Hill v. Drainage Co. (Sup.), 29 N. Y. Supp. 427, it is said: "In case a communicatfon is *prima facie* privileged, the existence or non-existence of malice on the part of the defendant is a question of fact, and the plaintiff, before he can recover, must affirmatively establish to the satisfaction of the jury that the publication complained of was made through malice. This may be shown from the communication, the circumstances under which it was written, and it may be inferred from a variety of facts. * * * The occasion was privileged. Did the publication go beyond the occasion, or, in other words, was more written than the occasion justified? This depends upon the terms of the communication and the facts outside of it, and was an issue of fact for the jury." See also Comfort v. Young, 100 Iowa, 627, 69 N. W. Rep. 1032; Strode v. Clement (Va.), 19 S. E. Rep. 177; Klinck v. Colby, 46 N. Y. 427.

INJUNCTIVE RESTRAINT OF UNFAIR COMPETITION IN TRADE.

Within the past quarter of a century the law of unfair competition in trade has sprung into being, and has developed into perfection. The law of patents, the law of trade-marks and the law of copyright had attained their full growth long before the term "unfair competition" had acquired its present and distinctive meaning. One who infringes a patent, a trade-mark, or a copyright is, indeed, guilty of an unfair competition in the sense usually attached to those words. But unfair competition covers the field of commercial fraud that the narrower law of trade-marks signally

failed to cover; it is the American synonym for the "passing off" of the English,[1] and the "concurrence deloyale" of the French[2] decisions. The whole question of fairness in trade is peculiarly within the province of equitable jurisdiction. The law of unfair competition comprises and includes the rights and remedies which grow out of fraudulent competition in trade, where the defrauded trader is not entitled to protection by reason of the infringement of any technical trade-mark right. In 1896 Lord Chancellor Halsbury, addressing the house of lords, said: "For myself, I believe the principle of the law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else."[3] This sentence is a terse statement of the fundamental maxim of unfair competition. In 1877 Mr. Coddington, in his excellent digest of trade-mark cases, remarked that "the interference of courts of equity, instead of being found upon the theory of protection to the owner of trade-marks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals or symbols, is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals or symbols."[4] He added that this rule was fully supported by four cases, two English,[5] and two American,[6] which he cited. Since that time the recognition of the doctrine so expressed has grown steadily and certainly, and has reached the Supreme Court of the United States. In 1878 Mr. Justice Clifford said: "Nor is it necessary in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that there was an attempt on the part of the respondent to palm off his goods as the goods of the complainant."[7] In 1888 Mr. Justice Field said "the case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture to the injury of the plaintiff."[8] Three years later Mr. Chief Justice Fuller announced the doctrine clearly and unequivocally, in these words: "The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's property in it, and of the defendant's unlawful use thereof. If the absolute right belonged to plaintiff, then, if an infringement were clearly shown, the fraudulent intent would be inferred, and if allowed to be rebutted in exemption of damages, the further violation of the right of property would nevertheless be restrained. It seems, however, to be contended that plaintiff was entitled at least to an injunction, upon the principles applicable to cases analogous to trade-marks, that is to say, on the ground of fraud on the public and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's—would, in a proper case, constitute ground for relief."[9]

The growth of the subject under discussion has been promoted most largely by the federal courts. Once the law of unfair competition was recognized the general principles of equity applicable to fraud were freely applied to appropriate states of fact as they arose. One of the clearest statements of the doctrine is to be found in an opinion of Judge Coxe: "No man has a right to use names, symbols, signs or marks which are intended, or calculated, to represent that his business is that of another. No man should in this way be permitted to appropriate the fruits of another's industry, or impose his goods upon the public by inducing it to believe that they

[1] Mitchell v. Henry, L. R. 15 Ch. D. 181.

[2] *Poullet, Marques de Fabrique et de la Concurrence Deloyale*, 4th Ed. (Paris, 1898) secs. 459 *et seq.*

[3] Reddaway v. Banham, L. R. (1896) A. C. 199 204.

[4] Coddington, Digest, sec. 36.

[5] Lee v. Haley (1869), 21 L. T. (N. S.) 546, 18 W. R. 181, 39 L. J. Ch. 284; Wotherspoon v. Currie (1872), 22 L. T. (N. S.) 260, 18 W. R. 562, 27 L. T. (N. S.) 393, L. R. 5 H. L. 508.

[6] Newman v. Alvord (1872), 51 N. Y. 189, 35 How. Pr. 108; Kinney v. Basch (1877), Cox, Manual, 542.

[7] McLean v. Fleming, 96 U. S. 245.

[8] Goodyear Glove Co. v. Goodyear Rubber Co., 128 U. S. 598-604.

[9] Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537.

are the goods of some one else. If A presents his goods in such a way that a customer who is acquainted with the goods of B and intends to purchase them is induced to take the goods of A instead, believing them to be the goods of B, A is guilty of a fraud which deceives the public and injures his competitor. Where the goods of a manufacturer have become popular not only because of their intrinsic worth, but also by reason of the ingenious, attractive and persistent manner in which they have been advertised, the good will thus created is entitled to protection. The money invested in advertising is as much a part of the business as if invested in buildings or machinery, and a rival in business has no more right to use the one than the other, —no more right to use the machinery by which the goods are placed on the market than the machinery which originally created them. No one should be permitted to step in at the eleventh hour and appropriate advantages resulting from years of toil on the part of another. The action is based upon deception, unfairness and fraud, and when these are established the court should not hesitate to act. Fraud should be clearly proved; it should not be inferred from remote and trivial similarities. Judicial paternalism should be avoided; there should be no officious meddling by the court with the petty details of trade; but, on the other hand, its process should be promptly used to prevent an honest business from being destroyed or invaded by dishonest means."[10]

To a student of this subject it is very clear that in its inception the law of unfair competition was devised to protect the public, and not in recognition of any right of the plaintiff to the injunctive relief of equity. He had adopted a geographical word, a generic term, or words otherwise *publici juris*, to designate his merchandise. Perhaps he had no arbitrary and distinctive device, symbol or mark whatsoever, but relied upon the shape, form, size or color of his packages to guide the public to his goods after they had left his hands in the course of trade. He had, at all events, none of those methods of distinguishing his goods from those of other dealers or producers to which the law gives the user a property right and calls a "trade-mark." Yet his goods had a fixed quality and were sought for by the public. When a dishonest competitor prepared his goods in similar packages, or by other means sought to palm them off upon the public as those of the plaintiff, the chancellor might grant the injunction, but if he did it was with the protection of the public uppermost in his mind and foremost in his opinion. In one of the early and leading cases, Lord Langdale said: "My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the name of Day & Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain at the expense of Day's estate a benefit for himself, to which he is not in fair and honest dealing entitled."[11] On the other hand, Judge Thayer has said that the relief is granted "to restrain the defendants from perpetrating a fraud which injures the complainant's business and occasions him a pecuniary loss,"[12] saying nothing of the right of the public at large to protection from this species of fraud. Unquestionably the jurisdiction of equity is exercised in this class of cases, as Mr. Chief Justice Fuller puts it, "on the ground of fraud on the public and on the plaintiff."[13]

San Francisco. JAMES L. HOPKINS.

[10] Hilson Co. v. Foster, 80 Fed. Rep. 896 897.

[11] Croft v. Day, 7 Beav. 84.

[12] Carson v. Ury, 39 Fed. Rep. 777.

[13] Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537.

PRINCIPAL AND SURETY—LIABILITY—SCOPE —DISCHARGE OF SURETY.

KIRSCHBAUM v. BLAIR.

Supreme Court of Appeals of Virginia, January 25, 1900.

1. The undertaking of a surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms.

2. A bond was conditioned for the performance of a contract whereby the principals, who were salesmen, agreed to sell goods on commission for the obligees, who were to make advances for traveling and personal expenses, as might, in their judgment, be "warranted by accepted sales" made by the salesmen, and, if such advances exceeded their commissions, the excess should be returned. Held, that the act of the obligees in making advances under the contract before it was to take effect, and before there were any "accepted sales," without the consent of the sureties, operated to release them.

CARDWELL, J.: This is a writ of error to a judgment of the law and equity court of the city of Richmond, and the facts of the case out of which the suit arises are practically uncontroverted. They are as follows:

W. H. Weisiger and S. M. Weisiger, of Richmond, Va., styling themselves as W. H. Weisiger & Bro., or Weisiger & Bro., as they will be spoken of in this opinion, entered into a written contract with A. B. Kirschbaum & Co., wholesale clothing merchants, of the city of Philadelphia, whereby Weisiger & Bro. agreed to travel for and sell the clothing of Kirschbaum & Co. in the States of North Carolina, Virginia, part of West Virginia, and adjacent territory, as directed by Kirschbaum & Co., and from a line of samples and according to the prices and terms given by them to Weisiger & Bro.; Kirschbaum & Co. on their part agreeing to pay Weisiger & Bro. a commission of 8 per cent. on all their shipped sales paid for by customers, and further agreed to advance to Weisiger & Bro., from time to time, money for traveling and personal expenses, as might, in Kirschbaum & Co.'s judgment, be warranted by accepted sales made by Weisiger & Bro. All such advances, however, were to be deducted from the commissions earned by Weisiger & Bro. at the time of final settlement, which it was stipulated should be made as nearly as possible at the end of each season; and, if Weisiger & Bro. should not, by the commissions on their joint sales, earn the amount of money so advanced, then they were to be severally and jointly responsible for the sum of money so advanced and not earned under the contract. Weisiger & Bro. agreed to give satisfactory security in the sum of $2,000 that these advances should be promptly returned to Kirschbaum & Co. at any time within 60 days of their notification by Kirschbaum & Co. of a desire for a settlement. By a subsequent provision in the contract, Kirschbaum & Co. reserved the right to reject all or part of any orders, at their own discretion, that might be sent in by Weisiger & Bro., and it was agreed that such rejected orders, as well as merchandise returned by customers and "failed accounts," should not be considered as sales under the contract, and that, if commissions had been paid on orders where the goods were returned, or where the customers afterwards failed, the commissions so paid should be promptly returned to Kirschbaum & Co. by Weisiger & Bro. or their sureties. It was further provided that the contract should remain in force for one year, commencing December 1, 1894.

Pursuant to the contract, Weisiger & Bro., in the form of a bond bearing the same date of the contract, namely, November 24, 1894, gave the security required; Lewis H. Blair and T. A. Jacobs becoming their sureties. The bond was conditioned for the faithful performance by Weisiger & Bro. of all the covenants and conditions of the contract; the contract being referred to, and made a part of the bond.

The contract having been made, and the bond given, Weisiger & Bro., who had been furnished by Kirschbaum & Co. with a line of samples and lists of prices of the goods to be sold by them, proceeded, in accordance with the contract, to travel, and sell the clothing of Kirschbaum & Co., in the territory named, and continued to do so throughout the year beginning December 1, 1894. In the meantime, however, Kirschbaum & Co. had advanced Weisiger & Bro., from time to time, considerable sums of money. On October 1, 1895, Kirschbaum & Co. gave Weisiger & Bro. 60 days' notice, as provided for in the contract, that they required a settlement of the accounts between them, and at the same time gave the sureties, Blair and Jacobs, a like notice. After some delay, caused in part by the sudden death of W. H. Weisiger, a complete account of the transactions between Weisiger & Bro. and Kirschbaum & Co. was made up by the latter. The account consists of two parts: First, an itemized statement of the sums advanced by Kirschbaum & Co. from time to time to Weisiger & Bro. for traveling and personal expenses, or paid them on account; and, second, a statement of all the sales made by Weisiger & Bro., upon which they were entitled to 8 per cent. commission under the contract, and the balance thereby found to be due Kirschbaum & Co. was $1,353.86, upon which they claimed interest from January 1, 1896.

The estate of W. H. Weisiger being insolvent, and S. M. Weisiger being unable to pay the amount claimed by Kirschbaum & Co. on the account rendered, demand was made by them on the sureties on the bond given Weisiger & Bro. for the payment of the balance of $1,353.86, with interest, shown to be due Kirschbaum & Co. by the account; and, the sureties, Blair and Jacobs, refusing to pay this balance, this suit was instituted, and at the trial thereof there was a verdict and judgment for the defendants, and the case is before us upon a writ of error.

It appears that on November 29, 1894, Kirschbaum & Co. advanced to Weisiger & Bro. $100, and on the 3d of December, 1894, $400, which amounts were used by Weisiger & Bro., it is claimed, in purchasing railroad mileage books, and by February 11, 1895, their advancements to Weisiger & Bro. aggregated $1,368, when the gross sales made by them, none of which had been accepted by Kirschbaum & Co., amounted to only $53.50.

It further appears that the total sales made by Weisiger & Bro. accepted by Kirschbaum & Co. amounted to only $11,522.25, upon which they were entitled to commisions, at 8 per cent., $921.78, while the total advancements made to them amounted to $2,275.64.

It was contended by Blair and Jacobs, the sureties for Weisiger & Bro., that the advancements, or the greater part of them, made by Kirschbaum & Co. to Weisiger & Bro., were not authorized by the terms of the contract between the parties, and that, therefore, they, as the sureties on the

bond, were not bound for the balance claimed by Kirschbaum & Co., and sued for in this action.

At the trial the plaintiffs asked for five instructions, and the defendant also asked for five instructions, all of which were refused, except the defendant's first instruction, which is as follows:

"Any dealing between the principal debtor and the creditor which vary the situation, right or remedies of the surety after the contract is made will release him; and if the jury believe, from the evidence, that the plaintiffs made a contract with the Weisigers, which, on its face, was not to go into force until the 1st of December, 1894, and which provided that the money which was to be advanced under its provisions to said Weisigers, and for the return of which, under certain conditions, the defendants were to be bound as sureties, was to be advanced from time to time 'as may, in the judgment of the plaintiffs, be warranted by accepted sales' made by said Weisigers for said plaintiffs, and that the plaintiffs advanced money to said Weisigers before the 1st day of December, 1894, and before there were any accepted sales, without the knowledge or consent of said defendants, these facts operate as a release of the sureties, and the jury should find for the defendants."

Plaintiffs' exceptions to the action of the lower court in giving the above instruction and in refusing the five instructions asked for on their behalf present the only question that need be considered, viz.: what is a proper construction of the contract between the parties?

While, as contended by counsel for plaintiffs in error, the contract of a surety or guarantor being just as legal as that of the principal, there is no good reason for holding that in arriving at the intention of the parties one set of rules shall govern when the principal, another when the surety or guarantor, is concerned—that is to say, that a certain set of words in a contract mean one thing when the principal is defendant, and that the same words in the same contract mean another thing simply because the defendant is a surety or guarantor—is absurd, and that the meaning of the words is not to be affected by the fact that the party sought to charged is principal, surety or guarantor. Brandt, Sur. § 94; Gates v. McKee, 13 N. Y. 232; Belloni v. Freeborn, 63 N. Y. 388; Collier v. Express Co., 32 Gratt. 718. But the authorities cited do not stop there. Brandt on Suretyship & Guaranty, continuing in section 94, says: "On the other hand, a surety or guarantor usually derives no benefit from his contract. His object generally is to befriend the principal. In most cases the consideration moves to the principal, and he would be liable upon an implied contract, while the surety or guarantor is only liable because he has agreed to become so. He is bound by his agreement, and nothing else. No implied liability exists to charge him. It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms, or to permit it to be altered without his consent, would be not to enforce the contract made by him, but to make another for him."

It is also well settled that in the construction of the contract of a surety or guarantor, as well as of every other contract, the true question is, what was the intention of the parties, as disclosed by the instrument read in the light of the surrounding circumstances? But when the contract of a guarantor or surety is duly ascertained and understood from the written language in which he has contracted, the case must be brought strictly within the guaranty and the liability of the surety cannot be extended by implication. Their liability is always *strictissimi juris*, and cannot be extended by construction. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound and no further. The undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. McCluskey v. Cromwell, 11 N. Y. 598; Smith v. U. S., 2 Wall. 237, 17 L. Ed. 788; Blanton v. Com., 91 Va. 16, 20 S. E. Rep. 884; Ayers v. Hite's Infants, 97 Va. —, 34 S. E. Rep. 44, and authorities cited.

There would seem to be some conflict between the authorities just cited and the authorities cited by counsel for the plaintiffs in error in support of their contention that the instrument in this case is to be liberally construed, but there is none. Mr. Justice Story, in Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326, does say: "We have no difficulty whatsoever in saying that instruments of this sort (letters of credit) should receive a liberal interpretation;" but, says he, "by a liberal construction we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation so as to attain the objects for which the instrument is designed and the purposes to which it is to be applied."

In Gates v. McKee, *supra*, Denio, J., refers with approval to Lawrence v. McCalmont, quoting at length from Story, J., and to other authorities to sustain the view that there is no reason for putting on a guaranty a construction different from what is put on any other instrument; that with regard to other instruments the rule is that, if the party executing leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself. But he adds: "There is a sense, undoubtedly, in which it may be said these obligations (of sureties) are to be strictly construed, and it is this: that the surety is not to be held beyond the very precise stipulations of his contract. But where the question is as to the meaning of the written language in which he has contracted, there is no difference—and there ought not to be any—between the contract of a surety and that of any other party." To the same

effect is the decision of the court in Belloni v. Freeborn, and other cases cited by plaintiffs in error.

The writing may be read by the light of the surrounding circumstances in order more perfectly to understand the intent and meaning of the parties, but as they have constituted the writing to be the only outward and reliable expression of their meaning, no other words are to be added to it nor substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words expressed, but what is the meaning of the words they have used? 1 Greenl. Ev. § 277.

As said by Mr. Justice Strong in Maryland v. Baltimore & O. R. Co., 22 Wall. 113, 22 L. Ed. 713: "Ordinarily a reference to what are called 'surrounding circumstances' is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking."

In the case at bar the clause in the contract especially in dispute reads: "The firm (Kirschbaum & Co.) further agrees to advance to the said W. H. Weisiger & Bro., from time to time, money for traveling and personal expenses as may, in their judgment, be warranted by his accepted sales."

Plaintiffs in error accept as correct the rule of law laid down in Investment Co. v. Bayless, 91 Va. 134, 21 S. E. Rep. 279; Blanton v. Com., *supra*, and Ayers v. Hite's Infants, *supra*, but contend that when the contract is "fairly and reasonably interpreted, according to the intent of the parties as disclosed by the instrument, read in the light of the surrounding circumstances and the purposes for which it was made," they were authorized to make the advancements in question without regard to the "accepted sales" made by Weisiger & Bro. This view is the trend of the instructions asked for by plaintiffs in error at the trial and refused by the court. If that construction of the contract is to prevail, the undertaking by the bond was in no way limited, either by the contract as a whole or the words, "The firm further agrees to advance to the said W. H. Weisiger & Bro., from time to time, money for traveling and personal expenses, as may, in their judgment, be warranted by his [their,—W. & Bro.'s] accepted sales." It is necessary, to that construction, to strike out the words quoted, or to give them no meaning or import. But, say plaintiffs in error, they are entitled to force and effect, and left it to their judgment to say what advancements they might make to Weisiger & Bro., and when; their prime object being to make large sales and profit, and the contract and security was, as to them, a secondary consideration. This may have been the purpose and aim of plaintiffs in error, but it is not, by any reasonable construction, what the language employed in the contract means. There is nothing in the contract to justify a broader liability on the defendants in error, as sureties on the bond, than for advances "warranted by accepted sales,"—warranted or justified in the judgment of plaintiffs in error, fairly and honestly exercised, as defendants in error had a right to rely, by "accepted sales,"—all such advances to be deducted from the commissions earned by Weisiger & Bro. at the time of final settlement; and, if not earned by them on their joint sales, they were to be jointly and severally bound for the sums so advanced, as well as for commissions which had been paid to them upon sales of goods returned to plaintiffs in error; and Weisiger & Bro., or their sureties, defendants in error, were to repay such advancements and such commissions.

We do not say, and do not mean to say, that plaintiffs in error were not authorized to advance to Weisiger & Bro., under the contract, any sum or sums of money beyond the commissions on their "accepted sales," but we do say that plaintiffs in error were not authorized to make any advances to Weisiger & Bro. not "warranted," in the judgment of the plaintiffs in error, by "accepted sales" made by Weisiger & Bro. Indeed, this seems to have been the view taken by them when they wrote to W. H. Weisiger, March 9, 1895, "You [Weisiger] know you have drawn at least $1,000 more than what you are entitled according to your sales," and also admit in the same letter that they had already been advancing money to Weisiger & Bro. for "private purposes," and were not authorized to make any advances except for "business purposes." Why refer in that letter to the restrictions upon the right of Weisiger & Bro. to draw advancements to their sales, if they had the right to ask, and plaintiffs in error the right to make, advancements regardless of the sales made by Weisiger & Bro.? Why put the clause in the contract if it was only to serve the purpose of reserving the right to plaintiffs in error to exercise their judgment as to what advances they would make to Weisiger & Bro., and when? They had that right already without such a stipulation.

Plaintiffs in error were wholesale merchants, widely known, conducting a very large business, extending over many States, and it was reasonable for defendants in error to rely, and doubtless they did rely, for their protection, as sureties for Weisiger & Bro., upon the restriction in the contract of advancements to the latter to such as would be "warranted" in the judgment of plaintiffs in error, fairly and honestly exercised, by "accepted sales" made by Weisiger & Bro. There is nothing in the contract—as plaintiffs in error seem to contend was their situation—to have led defendants in error to the belief that Weisiger & Bro. were in straitened circumstances, and unable to work without considerable advances from plaintiffs in error. On the contrary, the language of the contract was well calculated to justify the belief, as testified to by one of the defendants in error, that Weisiger & Bro. had sufficient money to travel and sell goods for plaintiffs in error un-

til there were "accepted sales." We agree with counsel for defendants in error that it is a very different thing to go security for the return of advances by a man circumstanced as plaintiffs in error claim their agents (W & B) were,—unable even to begin their work without receiving large advances; and to go security for one situated as the sureties have had the right to believe from the contract Weisiger & Bro. were, to-wit, possessed of enough means to carry on the business until there were "accepted sales" sufficient to justify advances.

In Blanton v. Com., Keith, P., says: "The correct rule, says the Supreme Court of the United States (2 Wall. 235, 17 L. Ed. 788), is that any variation in the agreement to which the surety has subscribed, which was made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for one subscribed, will discharge the surety."

In that case the sureties subscribed to a bond duly accepted by the county court of Amelia county, in which their liability was divided among eight, while the attempt was made to enforce a liability upon a bond in which there were but seven, obligors, and it was held that the sureties were not bound. See also Calvert v. Dock Co., 2 Keen, 63; Mayhew v. Boyd, 5 Md. 110; Bragg v. Shairn, 49 Cal. 131; Simonson v. Grant, 36 Minn. 439, 31 N. W. Rep. 861.

The question in the last case cited was whether or not the sureties upon a bond for the faithful performance of the promises of a builder's contract were discharged by the owner of the house making payments to the builder at times before they were due under the contract. The grounds upon which the court held the sureties discharged were that, after the work was commenced, and the first installment of the contract price paid, and before the building materials were furnished by the contractors, the owner of the house so far departed from the terms of the contract that payments were made by him to divers persons on the order of the contractors, without reference to the state of the work or the terms of the contract, and in some instances to an amount exceeding the installments due as stipulated therein, and in anticipation thereof.

In this case, with a provision in the contract authorizing advances to Weisiger & Bro. when "warranted" by their "accepted sales," plaintiffs in error not only seek to enforce a liability on defendants in error for large advances to their principals, for private as well as business purposes, before there were "accepted sales,"—advances before there were any sales at all,—but also an advance before the contract went into effect. To enforce this demand, it would have to be held that a surety was bound for what his principal was bound, although it is conceded that his liability is *strictissimi juris*, and that to the extent, and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further.

We are of opinion that the court below did not err in refusing the instructions asked by plaintiffs in error and giving the instruction set out above. Nor did the court err in refusing plaintiffs in error a new trial. Therefore its judgment is affirmed.

Keith, P., and Reily, J., dissenting.

NOTE.—*Recent Cases on Discharge of Surety by Change in the Contract or Obligation.*—Where a surety gives a mortgage to secure performance of a contract and also payment of a note in no wise connected with the contract, an alteration of the contract, discharging the mortgage as to it, will not discharge it as to the note. Parke & Lacy Co. v. White River Lumber Co., 110 Cal. 658, 43 Pac. Rep. 202. The fact that material variations in a construction contract, made without the consent of the sureties on the contractor's bond, might operate for the benefit of the sureties, does not preclude them from release. Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. Rep. 397. Accompanying conditions in a contract for the construction of village waterworks, as to responsibility of the contractor for the character of the work, and the continuance of such responsibility until he should be released by formal action of the village board, was a provision that any cash payments made before completion of the work should in no way affect the conditions of the contract. Held, that such provision did not, as against sureties on the contractor's bond, justify a material variation in the mode of paying the contractor, or in the manner in which moneys, when paid, were to be disbursed. Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. Rep. 397. The fact that variations in a construction contract were made of public record, and might have been seen by the sureties of the contractor, did not prevent them from being released by the variations. Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. Rep. 397. After partly finishing the work under a contract with a municipal board, the contractor notified the board that he must abandon the contract, and by agreement with the board he made its treasurer his agent to receive money to become due under the contract, and therefrom to pay his employees and material-men. Held, such agreement having been made without his sureties' consent, they were released. Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. Rep. 397. A waiver by a village board of a condition of a contract for building waterworks that the contractor should give bond for keeping the works in repair for a year after their acceptance released the sureties on the bond given at the execution of the contract for its faithful performance. Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. Rep. 397. In the absence of a stipulation giving the sureties a right to participate in determining whether changes should be made, in the work done under a contract, for the performance of which they were bound, they were not entitled to notice of the changes. Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. Rep. 397. A contract for the construction of village waterworks provided that "the quantities of the work to be done," as specified, were approximate only, and could be increased or diminished by the village board, and that the village engineer could make such changes in the "forms, dimensions, and alignment of the work," as might, in his opinion and that of the board, be necessary for its proper fulfillment. Held, that sureties on the contractor's bond were not released by the making of material changes in the line, site, level, or dimensions of the water

pipes. Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. Rep. 397. The taking of a new note, payable on demand, for a debt evidenced by a prior note, payable on demand, does not release a surety on the prior note unless it appears to have been the intention that the second note should be accepted in payment of the first. Hall v. First Nat. Bank of Hays City (Kan. App.), 47 Pac. Rep. 566. Defendant, a surety on a note, was discharged, where, after he had agreed to a renewal of the note, the payee and a second surety, with the fraudulent intention of making defendant alone responsible as between the sureties, induced defendant, who could neither read nor write, to sign by mark, a renewal note, so drawn as to make him a principal, while the second surety signed as security merely. Hamilton v. Williams (Ky.), 38 S. W. Rep. 851. In an action against the sureties on a bond conditioned for the principal obligor's paying over money collected by him as agent on the first demand of plaintiff, obligee, a plea that plaintiff changed the time and manner of settlement provided in the bond does not state a defense, since the whole matter was in plaintiff's discretion. Lake v. Thomas, 84 Md. 608, 36 Atl. Rep. 437. Change in contract of employment, unknown by surety, and increasing the risk, works no discharge from liability on bond given the employer, stating that it "is expressly intended as a continuing guaranty, and conditioned, after reciting entry of the employee into the service of the employers, "for the transaction of such business as they might intrust to him," that he shall faithfully perform his duties to them, "by virtue of his said employment or otherwise, and whether under or in the absence of any present or future contract, or any change whatever, either with or without notice to" surety. Singer Mfg. Co. v. Reynolds (Mass.), 47 N. E. Rep. 438. One gave a note for $1,500 and another as surety executed to the payee a mortgage as security, both the note and the mortgage being given the payee for purposes of negotiation. Before maturity of the note the payee negotiated it for $1,000, indorsing on the note and on the mortgage that the debt was thereby reduced to $1,000. Held, that the indorsement was not an alteration, but a new agreement, and in effect a credit, and the surety was not released. Solicitors' Co. v. Savage (Fla.), 23 South. Rep. 413. Where a note to a bank recited that stock deposited as collateral security was pledged to secure the note "and all other indebtedness owing by us" to said bank, and a renewal of the note was changed so as to read, "owing by us, or either of us, this change being made without the knowledge of the obligors, who failed to notice it when they signed, was a fraud upon the surety to whom the stock belonged, and the stock cannot, therefore, be held by the bank to secure a debt of the principal of which the surety had no knowledge. Haldeman v. German Security Bank (Ky.), 44 S. W. Rep. 383. A surety on an obligation purporting to be executed for the purpose of assisting the maker of a note to raise funds with which to buy stock and run a mill is released where the one furnishing the money, and who is charged by acceptance of the obligation with knowledge of said purpose, diverts a half of it, without knowledge of the surety, to the payment of an old debt of the maker, and this though there be no fraud on his part, and though the debt was secured, and the release of the security added to the protection of the surety. Gane v. Farmers' Bank of Kentucky (Ky.), 45 S. W. Rep. 519. A contract provided that "all logs shall be put into Pine lake, near the premises aforesaid, on or before the first day of April, 1896, and shall be driven by second parties to the boom or booms in Lake Superior at the mouth of Pine river;" and no route for hauling them to Pine lake was prescribed. The logs were put into Ives lake, and from there floated into Pine lake. Held not such an alteration of the contract as would release the contractor's sureties. Haines v. Gibson (Mich.), 73 N. W. Rep. 126. A provision in a building contract that no alterations shall be made except upon written order is not inserted for the exclusive benefit of the owner, so that the surety of the contractor cannot claim to be discharged by a breach thereof. Northern Light Lodge, No. 1, I. O. O. F., v. Kennedy (N. Dak.), 73 N. W. Rep. 524. Sureties on a bond conditioned on the performance of a contract by the principal are not discharged by reason of a change in the contract that was the result of an agreement entered into by them and the obligee and principal. Janes v. Ferd Heim Brewing Co. (Tex. Civ. App.), 44 S. W. Rep. 696. The sureties on a bond which provided that the obligor should pay over all moneys collected during the continuance of the present agency or "any future agency" cannot escape liability because a new contract of agency had been afterwards entered into between the obligor and the obligee. New York Life Ins. Co. v. Loomis (Wis.), 75 N. W. Rep. 421. After the execution of a contract of license for the use of certain patented machines, which provided that the licensor should furnish additional machines if called for, by agreement between the parties a type-written slip was pasted on the margin opposite the provision relating to the additional machines, which read: "Said machines to be shipped said licensee within 30 days after written notice is given to licensor." Held, that such slip did not constitute an alteration of the original contract affecting a surety but was simply a memorandum of a subsequent and collateral agreement. United States Glass Co. v. Mathews, 32 C. C. A. 364, 89 Fed. Rep. 828. Where a contract provided for the construction, before a certain date, of a building, the lower story of which should be 96 feet long and the upper story 75 feet long, an agreement between the owner and contractor, without the consent of the sureties on the latter's bond, to extend the upper story to the same length as the lower within the agreed time, was a material change, which released the sureties. O'Neal v. Kelley (Ark.), 47 S. W. Rep. 409. The assurance of a contractor to the owner that an alteration in the building contract would not affect the original contract does not bind the sureties on the contractor's bond, who did not consent. O'Neal v. Kelley (Ark.), 47 S. W. Rep. 409. Where a contractor agreed to perform a substituted contract which materially changed the original contract, without the consent of the sureties, it is immaterial that he failed to perform it, since it is the execution, and not the performance, of the substituted contract, that discharges the sureties. O'Neal v. Kelley (Ark.), 47 S. W. Rep. 409. In an action against a surety on a bond conditioned for the performance of a contract to supply a town with lights at $50 a light per annum, no defense was presented by answer alleging that, after the contract was abandoned by the contractor, a bid was submitted at $57 per light; that it was temporarily withdrawn for changes, when the bidder was informed that a bid for over $50 would not be considered; and that within three days thereafter a bid at $63 was accepted. Town of Sullivan v. Cluggage (Ind. App.), 52 N. E. Rep. 110. A surety on a bond, conditioned for the performance of a builder's written contract according to specifications, may insist on the strict terms of his obligation, and claim a discharge for a material alteration of the con-

tract, though made for his benefit. Stillman v. Wickham (Iowa), 76 N. W. Rep. 1008. Where one signed as surety a bond conditioned for the performance of a builder's written contract, and the owner changed the plans, and extra work was done as she requested, on her oral promise to pay, without a special agreement minuted on the original contract, as therein required, and she took the erection of the building from the contractor's control, directed the workmen, and rejected material duly furnished by the contractor, and bought other, without consulting him, the surety is discharged, notwithstanding the contractor acquiesced in all that was done. Stillman v. Wickham (Iowa), 76 N. W. Rep. 1003. A, as surety for D, signed a fidelity bond to plaintiff, a New Jersey corporation, doing business at C, in Kansas, conditioned that he would faithfully perform his duties, account for and pay over all moneys and other property belonging to it that might be intrusted to him by virtue of such employment. Plaintiff, without the knowledge of A, terminated this employment in Kansas, removed D to Missouri, where he was employed under a new contract, and after a lapse of some years, returned him to L, Kansas. Held, that the termination of the contract of employment at C, in Kansas, and the removal of D to Missouri, discharged A from any obligation on the bond for defaults occurring thereafter. Singer Mfg. Co. v. Armstrong (Kan. App.), 54 Pac. Rep. 571. Sureties on a bond given by a contractor to secure the owner against loss from the non-fulfillment of the contract, and the material-men for the payment of their claims, are not released from liability to material men whose claims have accrued against the contractor by a subsequent payment by the owner to the contractor in violation of the terms of the contract, though such payment might release the liability of the sureties to the owner. School Dist. of Kansas City v. Livers (Mo.), 49 S. W. Rep. 507. A surety may stand on the strict terms of his contract. First Nat. Bank v. Goodman (Neb.), 77 N. W. Rep. 756. The purchasers of land, including defendant, had it conveyed to a third person, in trust to secure a note to a bank given by the purchasers other than defendant. As additional security, and under an agreement with defendant, one of the purchasers pledged shares of stock to the bank. Prior to the maturity of the note, the bank, at the request of the pledgor, but without the consent of defendant, sold the stock for its market value, and indorsed the proceeds on the note. The bank sought to foreclose the deed as an equitable mortgage. Held, that while defendant's interest in the property became a surety for his co tenant's debt, the sale of the collateral without his consent did not alter the original contract, and hence did not discharge the liability of the land. Denny v. Seeley (Oreg.), 55 Pac. Rep. 976. Where the value of stock pledged as security for a debt, to secure which a trust deed to land in which defendant has an interest has also been pledged, had declined since the sale of it at its market value to apply on the debt, defendant cannot object to the foreclosure of the trust deed, because of the sale without his consent. Denny v. Seeley (Oreg.), 55 Pac. Rep. 976.

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 69.

The subject of State taxation of national banks is very fully and exhaustively treated in a note to the case of People v. National Bank, decided by the Supreme Court of California, and reported in this volume. The complicated questions as to the *situs* of debts for the purposes of garnishment and of property in transit in the hands of common carriers, is the subject of a note to the case of National Bank v. Furtick, decided by the Supreme Court of Delaware. New York Life Ins. Co. v. Babcock is an interesting case on the law of life insurance, and is followed by a note wherein the authorities are all collated on the subject of when the contract of insurance is completed. Common law practitioners and students of Blackstone will find much interest at least in the note to Revell v. People, decided by the Supreme Court of Illinois, wherein the question as to what are purprestuers and the remedies for their abatement. Breaux v. Le Blanc, decided by the Suprame Court of Louisiana, is followed by a long note on the subject of what is a sufficient cause for the dissolution of a partnership. This series of volumes is published by the Bancroft-Whitney Company, San Francisco.

LEGALIZED WRONG.

A comment on the tragedy of Jesus. A novel field for investigation by a lawyer. The author reveals his well trained legal mind in his painstaking and systematic treatment; takes nothing for granted; nothing on faith and has managed to condense more careful and thoroughly digested evidence from a legal standpoint into the small compass of 35 pages on this always interesting subject than the average clergyman is able to get into 50 sermons. We find this little book so interesting, his examination of authorities so systematic that, on finishing the reading of the book, we only wished he had made it ten times as large. We have made an examination of authorities cited, so far as made from the Bible, and find them absolutely correct; the Bible being the only book relied upon as absolute authority by the author, his references being mainly to the four Gospels. Historians of the time took little or no note of this, the most important event within historic knowledge. Josephus devoted but a few lines to the subject, but what he did say was eminently fair and reasonable, and all that the Christian could expect from this eminent historian. Rome took little or no notice of the matter—Rome had many Gods. The contention in its Judean province as to whether Jesus was an ordinary man, a prophet, or a God, did not elicit their notice. The author makes frequent references and some quotations in his foot notes to the writings of Philip Schaff, Mankind, their Origin and Destiny (anonymous), B. Harris Cowper, Pierotti, Thomas George Bonney, Charles E. Blumenthal, Smith Goodenow, Theodore Keim, Arthur Ransom, Martin Von Kempen, Emil Schurer, Theodore Mommsen, S. Mendelsohn, John M. Clintock, Karl Wieseler, Meander and Ernst Renan. Jesus was crucified by the church, by that church claiming its origin direct from God; by the most technical and dogmatic church ever established; by that church established, fostered and relied uponjas an infallible teacher by the most religious people that ever lived. Pontius Pilate, the Pagan, defended Jesus as much as he thought proper within what he considered his jurisdiction—indeed he was his only defender at the trial. Pilate saw no legal reason why he should overrule the wishes of the people in regard to the punishment of one of their number for suggesting an improvement in theology and morals, a matter which Roman authorities were instructed to leave entirely in the hands of the local tribunals. The priests, the church and the Sanhedrim, that august court, had this matter entirely in their own hands. The church

then as now arrogated to itself all spiritual knowledge, all goodness. Then, as now, real merit and justice were ignored. Form, acrimony and dogma have ever been the attributes of the churches. The churches of our day had rather preach the doctrine of the Trinity than tell its members of their sinfulness. What can be found in the four Gospels to justify the doctrine of the Trinity. Jesus by his conduct throughout and immediately preceding his crucifixion showed that he was possessed of human attributes of human fears, and could suffer as we suffer; that he was possessed of a dual nature, human and Divine, like ourselves, only that he possessed the Divine in a much greater degree and the human in a much less. How he suffered in the Garden of Gethsemane, "My soul is exceedingly sorrowful even unto death. · · · O, my Father, if it be possible, let this cup pass from me, nevertheless not as I will, but as thou wilt." And again on the cross, "My God, my God, why hast thou forsaken me," and then the Divine manifesting itself, "Father, forgive them for they know not what they do." We are a strange dual mixture of good and bad. Sometimes the good in us predominates; sometimes the bad. Should we believe in dogma which is opposed to reason? We think not. We find no antagonism between the Gospels and reason. The four Gospels are not opposed to reason; both teach that sin must be punished; that good will be rewarded. Pontius Pilate believed in justice but he had not the teachings of Jesus to guide him, he was not conversant with his teachings. Suffering is the stepping-stone toward perfection through the slow process of evolution. The suffering of one cannot atone for the sins of another. Follow the lofty teachings of the noble and Divine Prophet and Teacher of Nazareth. The way to atone for our sins is to quit them. The way to do right is to cease doing wrong. The Heavenly Father will take care of the rewards and punishments. When will mankind learn that relief from the sin of our alleged first parents must come through a cessation from its repetition. Then shall come justice, then the millennium. The author is Robert Clowry Chapman, of the Chicago Bar. Published by Fleming H. Revell Company. Chicago, New York and Toronto.

BOOKS RECEIVED.

A Treatise on the Law of Wills, Including Their Execution, Revocation, etc., also a Full Discussion of the Rules and Principles of their Construction, together with a Consideration of those Rules of the Law of Real Property and of the Doctrines of Equity which are most Frequently Applicable to Testamentary Dispositions of Property, with full References to the Latest American and English Decisions. By H. C. Underhill, LL. B., of the New York Bar. Author of a "Treatise on the Law of Evidence," and a "Treatise on the Law of Criminal Evidence." In Two Volumes. Chicago: T. H. Flood and Company, 1900. Sheep, pp. 1,501. Price, $12.60 delivered. Review will follow.

HUMORS OF THE LAW.

An Alternative Sentence.—Judge—Did you steal the hog or did you not?

Prisoner—No, Judge, I did not; but if yo' kind of thinks I'se lyin' about it, and am gwine to give me six months for lyin', I'd sooner lie about it, and say I did steal the hog, and get two months for stealin' the hog I didn't stole.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION—Splitting Cause of Action by Agreement.—As the rule prohibiting the severance of a cause of action is for the benefit of the defendant, he may waive the rule, and consent to a division; and where, upon a consideration moving from him, the plaintiff enters into an agreement for forbearance as to a portion of his claim, defendant cannot plead a judgment on the remainder of the claim as a bar to a second action, brought after the time of forbearance agreed upon has expired.—CLAFLIN & KIMBALL v. MATHER ELECTRIC CO., U. S. C. C. of App., Second Circuit, 98 Fed. Rep. 699.

2. ADMINISTRATION—Administrator—Appointment.—A petition for the appointment of administrator, stating that the alleged decedent had not been seen for more than seven years; that when last seen he was in Colorado, and seemed to be insane, and that he left the train, leaving his baggage; that strict search was made for him, and notices sent throughout the neighborhood where he was last seen, and inquiry made at all insane asylums in the west, and no word was received from him,—presents a *prima facie* case of death sufficient to sustain conclusion of county judge in appointing an administrator for said person.—WISCONSIN TRUST CO. v. WISCONSIN MARINE & FIRE INS. CO. BANK, Wis., 81 N. W. Rep. 642.

3. ADMINISTRATION—Petition for Sale of Real Property.—A petition by an executor for the sale of real property for the payment of debts cannot be assailed on the ground that it does not state facts sufficient to constitute a cause of action, unless it exhibits a total failure to state the necessary facts; and a petition which shows a substantial compliance with Code Civ. Proc. § 1537, prescribing what such a petition should contain, is sufficient.—IN RE HEYDENFELDT'S ESTATE, Cal., 59 Pac. Rep. 839.

4. ADMINISTRATION—Power to Sell Mortgage Notes.—An administrator has no power to sell or transfer notes

secured by mortgage which belonged to the deceased at the time of his death, and such notes taken up by a third party will be regarded and held as paid, as between the administrator and such third party; but, as between such third party and a subsequent mortgagee with notice of the prior mortgagee, such third party may be subrogated to the lien of the prior mortgage, when no additional burdens will thereby be imposed upon such subsequent mortgagee, and such third party did not pay the notes to the administrator as a mere volunteer.—MILLER v. STARK, Ohio, 56 N. E. Rep. 11.

5. ANIMALS — Trespassing Dog — Killing. — Where plaintiff's dog was on defendant's premises, running through the corn rows, when the corn was matured, and had not damaged defendant's cotton, but he killed it to prevent such damage, the fact that defendant had given notice to plaintiff to keep the dog off the premises is not a perfect defense, but the jury should consider all the evidence to determine the reasonableness of the alleged necessity of killing.—HODGES v. CAUSEY, Miss., 26 South. Rep. 945.

6. ANIMALS—Unlicensed Dog.—By the common law, a dog is property, for an injury to which an action will lie.—CHAPMAN v. DECROW, Me., 45 Atl. Rep. 295.

7. ASSIGNMENTS—Claims Against United States.—Rev. St. U. S. § 3477, declares that no assignment of a claim against the United States after its allowance and the issuance of a warrant for its payment shall be valid unless executed under certain formalities. Held, that such provision was for the benefit of the United States only, and hence, where the government had recognized the assignees' rights by passing a special act making the judgment recovered by them the foundation of an appropriation, such assignment was valid as between the parties, though it did not comply with the statutory formalities.—THAYER v. PRESSEY, Mass., 56 N. E. Rep. 5.

8. ATTORNEY—Retainer—Authority. — The fact that an attorney has a disputed agreement with his client, which, if established, would entitle him to a share of whatever money might be recovered in a certain cause, will not warrant the attorney in prosecuting, as attorney of record for his client, but against her will, a writ of error to reverse a judgment rendered in the cause.—DELANEY v. HUSBAND, N. J., 45 Atl. Rep. 265.

9. BANKRUPTCY—Corporations—Water Company.—A water-supply company, engaged in the business of obtaining, transporting and supplying pure water for municipal and domestic use, receiving compensation from consumers in the shape of fixed rentals, is not "engaged principally in trading or mercantile pursuits," within the meaning of Bankr. Act, 1898, § 4b, although it obtains part of its water supply by purchase, and therefore is not liable to be adjudged bankrupt upon involuntary proceedings against it.—IN RE NEW YORK & W. WATER CO., U. S. D. C., S. D. (N. Y.), 98 Fed. Rep. 711.

10. BANKRUPTCY—Dissolution of Liens—Mechanics' Liens.—Where, under the laws of the State, a mechanics' lien is created and made to attach to the property only upon the filing in the office of the county clerk of a notice claiming such lien, and not from the doing of the work or furnishing the materials, a lien acquired by the filing of such a notice within four months prior to the filing of a petition in bankruptcy against the insolvent debtor will be dissolved by his adjudication as a bankrupt, being a "lien obtained through legal proceedings," within the meaning of Bankr. Act, § 67f; and a proceeding in a State court for the foreclosure of such lien should be stayed.—IN RE EMSLIE, U. S. D. C., S. D. (N. Y.), 98 Fed. Rep. 716.

11. BANKRUPTCY—Exemptions — Homestead — Abandonment.—Under the laws and judicial decisions of Iowa relating to homestead exemptions, a bankrupt will be entitled to have his homestead set apart to him as exempt, although he has, for several years past, leased it to third parties, instead of occupying it himself, provided he has not abandoned the property as a home, but has always intended to resume his occupancy of the premises at some future time.—IN RE POPE, U. S. D. C., S. D. (Iowa), 98 Fed. Rep. 722.

12. BANKRUPTCY—Preferences—Payment of Mortgage Debt.—Where an insolvent debtor, within four months prior to the filing of a petition in bankruptcy against him, pays to a mortgage creditor the amount of the note secured by the mortgage, with the effect of enabling such creditor to obtain a larger percentage of his debt than other creditors of the same class, such creditor having reasonable cause to believe that it was intended thereby to give him a preference, the amount so paid may be recovered from the creditor by the debtor's trustee in bankruptcy.—SHUTTS v. FIRST NAT. BANK OF AURORA, U. S. D. C., D. (Ind.), 98 Fed. Rep. 705.

13. BANKS AND BANKING—Collections.—Plaintiff delivered a deed and the purchaser's check on a distant bank to defendant, with instructions to deliver the deed on collection of the check, and to credit the proceeds to plaintiff's account. After the bank on which the check was drawn had mailed a draft to defendant in payment of the check, but before defendant had received it, the purchaser requested defendant to return the draft, because he was not satisfied with the title to the property, which defendant did. Held that, though the draft was payable to defendant, it held the proceeds in trust for plaintiff, and, since the mailing was equivalent to a delivery, defendant, by the wrongful return of the draft, was estopped to claim that he did not receive the proceeds of the check, and was liable to plaintiff therefor.—GREGG v. BIMETALLIC BANK, Colo., 59 Pac. Rep. 852.

14. BILLS AND NOTES—Accounting — Principal and Surety.—Where the holder of notes sued on, on which defendants were sureties, also held other unsecured notes against the debtor, and thereafter took a chattel mortgage on the debtor's property as security for all of the notes, it was entitled to apply the proceeds of the sale of such property, which was not sufficient to pay all of the notes, first to the unsecured notes, and was not required to apply such proceeds *pro rata* to the payment of the notes on which defendants were sureties as well as those unsecured.—CITIZENS' BANK v. WHINERY, Mich., 81 N. W. Rep. 694.

15. BILLS AND NOTES—Consideration—Bona Fide Purchasers.—A negotiable note, given for the services of a physician not qualified to practice, is enforceable by a holder, to whom it is transferred before maturity for value, without notice as to its consideration.—ROACH v. DAVIS, Tex., 54 S. W. Rep. 1070.

16. BILLS AND NOTES—Maturity—Transfer.—Where, after protest of a note indorsed in blank, and notification of indorsers, plaintiff, on the maker's representation that the note was good, and that he had better buy it, received it from the teller of a bank, which was the holder, who was not authorized to sell it, on payment of its value and protest fees, whether the transaction between the bank and plaintiff constituted a payment or sale of the note was a question of fact for the jury, and hence a finding that it was a transfer, and not a payment, was conclusive on appeal.—CAPWELL v. MACHON, R. I., 45 Atl. Rep. 259.

17. BILLS AND NOTES—Pleading.—In an action on a joint and several note signed by three defendants, the answer of one alleged that he signed the note as surety only, receiving no part of the consideration therefor, and that plaintiff extended the time of payment for a consideration, and without the consent of the surety. Held, that the answer was insufficient, since it did not show for whom defendant was surety, or who received the consideration, or to which of the makers the extension of time was given.—BOWMAN v. CITIZENS' NAT. BANK OF MARTINSVILLE, Ind., 56 N. E. Rep. 39.

18. BROKERS — Principal and Agent — Recovery of Profits.—Where a purchaser of stocks ratifies the sale, he cannot recover from the seller's broker profits

made by him, though part of such profits were made by tampering with the purchaser's broker.—ILLINGWORTH v. DE MOTT, N. J., 45 Atl. Rep. 272.

19. CARRIERS—Passengers—Scope of Servant's Employment.—Though one is a trespasser, a carrier is liable for an injury sustained by the malicious and willful act of its brakeman in expelling him from a train.—ST. LOUIS & S. F. R. CO. v. KILPATRICK, Ark., 54 S. W. Rep. 971.

20. CARRIERS OF GOODS — Delivery of Freight to Wrong Person.—The obligation of a common carrier of merchandise is to carry to the destination, and deliver to the consignee named in the address, unless prevented by the act of God or the public enemy; and delivery to a wrong person, not induced by some act or representation of the consignor, is not excused by any degree of care which the carrier may exercise.—OSKAMP v. SOUTHERN EXP. CO., Ohio, 56 N. E. Rep. 13.

21. CARRIERS OF PASSENGERS—Liability for Injury to Passenger.—An act of the legislature of New York required the elevation of the track of a railroad in New York City, and created a municipal board, which was given entire charge of the work through a designated portion of the city. While the work was being done the railroad company constructed temporary tracks on either side of the structure being built, over which it ran its trains. Through the negligence of the employees of a contractor under the board, engaged in the work, a derrick was permitted to swing over one of the tracks, and struck a car in a passing train, injuring the plaintiff, who was a passenger therein. Held, that the State having taken the work entirely out of the hands of the railroad company, and placed it in the hands of others, over whom the company had no control, the latter was not liable for their negligence, or for the injury to the plaintiff, unless its own employees failed to exercise proper care to anticipate or avoid the danger.—NEW YORK, ETC. R. CO. v. BAKER, U. S. C. C. of App., Second Circuit, 98 Fed. Rep. 694.

22. CARRIERS OF PASSENGERS — Negligence—Contributory Negligence.—Where plaintiff was injured while passing along the running board of a street car used to permit ingress and egress of passengers, evidence that the usual and ordinary use of the board was for passengers to go from one part of the car to another was admissible, since defendant's knowledge of the use of the board became material in determining the question of plaintiff's contributory negligence.—CITIZENS' ST. R. CO. v. HOFFBAUER, Ind., 56 N. E. Rep. 54.

23. CHATTEL MORTGAGES — Foreclosure — Agreement to Postpone — Consideration.—Where a purchaser of goods subject to a chattel mortgage agreed to assume and pay the mortgage if the holder would postpone foreclosure, the purchaser's promise constituted a sufficient consideration for the mortgagee's promise to forbear.—GIBSON v. MCINTIRE, Iowa, 81 N. W. Rep. 699.

24. CHATTEL MORTGAGE—Sale—Subrogation.—Where it clearly appeared that the greater part of the consideration for the purchase of mortgaged stock was a payment on the mortgage, the purchaser was not entitled to subrogation to the rights of the mortgagee as against one claiming a landlord's lien on the stock.—HUBBARD v. LE BARRON, Iowa, 81 N. W. Rep. 681.

25. CHATTEL MORTGAGES—Selection of Exempt Property.—Where a debtor mortgaged one of three teams, any one of which he might have claimed as exempt, the mortgage is not invalid because not signed by the wife as required by Code, § 2906, on a mortgage of exempt property, since the giving of the mortgage on such team was a waiver of the right to claim that particular team as exempt.—GROVER v. YOUNIE, Iowa, 81 N. W. Rep. 684.

26. CHATTEL MORTGAGES — Validity — Fraud.—The fact that a mortgagor of chattels knowingly allowed the mortgagee to sell and convert to his own use a portion thereof does not necessarily render the mortgage void as to creditors or incumbrancers in good faith, since the question of fraudulent intent is one of fact for the jury.—FIRST NAT. BANK OF CUSTER CITY v. CALKINS, S. Dak., 81 N. W. Rep. 782.

27. CONSPIRACY—Right of Action.—A complaint which alleges that the plaintiff, a dealer in farm produce, had a profitable business, that the defendants had conspired together to refuse to deal with him and to induce others to do likewise, it not appearing that their interference with his business was to serve any legitimate interests of their own, but that it was done maliciously, to injure him, and that the conspiracy had been carried into execution, whereby his business was ruined, states a cause of action.—ERTZ v. PRODUCE EXCHANGE CO. OF MINNEAPOLIS, Minn., 81 N. W. Rep. 737.

28. CONSTITUTIONAL LAW — Adoption of Constitution of United States as Condition of Admission of State.—The admission into the Union of the State of Nebraska "upon an equal footing with the original States in all respects whatsoever," by the Act of Congress of February 9, 1867, though made subject to the condition that the people adopt the constitution of the United States, did not make the fifth amendment of that constitution, requiring an indictment of a grand jury for a felony case, applicable to procedure in the courts of that State.—BOLIN v. STATE OF NEBRASKA, U. S. S. C., 20 Sup. Ct. Rep. 287.

29. CONSTITUTIONAL LAW—Barbers—Registration.—It is competent for the legislature of this State, in the interests of the public health and welfare, to enact laws for the purpose of regulating and throwing restrictions around the occupation or calling of barbers.—STATE v. ZENO, Minn., 81 N. W. Rep. 748.

30. CONTEMPT—Appeal.—An appeal will not lie from a judgment adjudging a person guilty of contempt, and punishing him for contumacious conduct toward the court, committed in its presence.—BRIZENDINE v. STATE, Tenn., 54 S. W. Rep. 962.

31. CONTRACTS — Consideration.—An agreement, signed by merchants of a town, obligating themselves to close their places of business "at 6:30 o'clock, beginning May 15th, 1895, and lasting until the first of September," was binding, the mutual promises being a sufficient consideration.—STOVALL v. MCCUTCHEN, Ky., 54 S. W. Rep. 969.

32. CONTRACTS — Construction.—Plaintiff contracted with a railroad to do certain grading, clearing, etc., on an extension to its road, and performed a portion of the work, but was prevented from completing it by the company's failure to provide right of way. Held, that a judgment obtained in the United States courts for the work actually performed, up to the time of such failure on the company's part, was not an adjudication of the damages he had sustained by reason of the failure to furnish right of way, and hence he could recover such damages in a subsequent action.—CHICAGO, ETC. R. CO. v. YAWGER, Ind., 56 N. E. Rep. 50.

33. CONTRACT—Leases — Privity — Substitution.—Defendant, being in possession of certain premises under a lease, agreed with plaintiff that, if he would purchase the premises, defendant would continue to occupy them as a packing house a certain length of time, and would buy therefor a certain amount of live stock yearly from plaintiff's stock yards, after which time the premises were to be conveyed to defendant. Held, that on purchase by plaintiff the agreement was substituted for the original lease, and on vacation of the premises by defendant plaintiff's remedy was action on the contract, and not on the lease.—SIOUX CITY STOCK YARDS CO. v. SIOUX CITY PACKING CO., Iowa, 81 N. W. Rep. 712.

34. CONTRACTS—Parol Evidence.—Where a contract obligated plaintiff's intestate to complete "all the excavating the parties of the first part desire to have done by September 1st," it was error to refuse to admit parol evidence of the circumstances under which the contract was made, to show what particular work was intended.—BODEN v. MAHER, Wis., 81 N. W. Rep. 661.

35. CONTRACT—Parol Evidence—Validity.—A contract between a father and his children, providing for the

settlement of all their claims against him for their interests in the community estate of their deceased mother, and acknowledging receipt in full of their respective shares therein, is not a mere receipt, and hence cannot be contradicted by parol evidence.—TAYLOR v. TAYLOR, Tex., 54 S. W. Rep. 1039.

36. CONTRACTS IN RESTRAINT OF TRADE — Public Policy.—An agreement by the seller of an established business not to engage in a similar business in the neighborhood where he had theretofore conducted the business sold is not void, as contrary to public policy. —JACKSON v. BYRNES, Tenn., 54 S. W. Rep. 964.

37. CORPORATIONS—Dissolution.—In a suit for dissolution of an insolvent corporation, on the petition of an officer, an order substituting creditors as plaintiffs, and making the former plaintiff a defendant, with leave to join all corporate officers as defendants, and to present all facts tending to show any liability of such officers or directors to the stockholders or creditors of the association, was not a final order, within Rev. St. § 3069, subd. 2, authorizing appeals from final orders in special proceedings, since the complaining party, being a party to the action, has an opportunity to appeal from any judgment entered therein.—WECHSELBERG v. MICHLESON, Wis., 81 N. W. Rep. 657.

38. CORPORATIONS — Organization.—The recording of the original articles of incorporation in good faith, in lieu of a verified copy thereof, as required by Laws 1874, ch. 118, § 4, and the holding of meetings, election of officers, and transacting business as a corporation, is sufficient to create the incorporators a corporation *de facto*, and to give them the rights of a corporation as to all persons with whom their dealings are mutually understood to be in that capacity.—SLOCUM v. HEAD, Wis., 81 N. W. Rep. 673.

39. CORPORATION—What Constitutes.—A "corporation aggregate" is a collection of individuals united in one body, under such a grant of privileges as secures the succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person or legal being, capable of transacting some kind of business like a natural person.—SIBLEY v. PENOBSCOT LUMBERING ASSN., Me., 45 Atl. Rep. 293.

40. CREDITORS' SUIT — Fraudulent Conveyance—Insolvency.—A judgment creditor's bill to subject land purchased in the name of the debtor's wife, the consideration being paid by the husband, during pendency of the action in which the judgment was entered, to the payment of the judgment, is demurrable, where it does not allege that the debtor was insolvent at the time he made the transfer, or that the transfer tended to create insolvency.—FOX v. LIPE, Colo., 59 Pac. Rep. 850.

41. CRIMINAL LAW — Forgery — Indictment. — Under Pen. Code, § 470, providing that one who, with intent to defraud another, falsely makes, forges or counterfeits any deed, indenture or "writing obligatory," is guilty of forgery, an information which fails to show whether a mortgage alleged to have been forged was given on real or personal property, or on any property, or whether it was given to secure a note or indebtedness of any kind, charges no offense.—PEOPLE v. TERRILL, Cal., 59 Pac. Rep. 836.

42. CRIMINAL LAW — Homicide — Malice — Deadly Weapon.—A charge that malice may be presumed from the use of a deadly weapon is not erroneous, as being abstract, or as taking from the jury the question whether the weapon used was deadly, where the weapon referred to, an oak stick 40 inches long, and from 2 to 3 1-2 inches in circumference, was in evidence.—WINTER v. STATE, Ala., 26 South. Rep. 949.

43. CRIMINAL LAW—Robbery—Menace.—Where a person parts with money upon a mere demand made in a rough, positive voice, with an oath, the taking is not robbery, the menace not being such as to excite reasonable apprehension of danger.—DAVIS v. COMMONWEALTH, Ky., 54 S. W. Rep. 959.

44. DEEDS—Construction.—An instrument conveying title to certain land, given in consideration of the cancellation and release of a vendor's lien and a mortgage on such land, and which recites that "it is the purpose and intention of this instrument to make an absolute and unqualified conveyance of said property, and to vest in grantee free, clear and unincumbered title thereto," although reserving the right to repurchase within three years, is a deed, and not a mortgage.—KIRBY v. NATIONAL LOAN & INVESTMENT CO., Tex., 54 S. W. Rep. 1081.

45. DEED—Construction—Parol Evidence.—A deed containing an exception of certain lands, with a declaration that the conveyance embraces the eating house which is on such excepted ground, if not expressly excluding the land, and carrying the house alone, presents such a case of doubt, that to remove it evidence is admissible that the grantor did not own the land on which was such house, but erected it under a license securing him the right ultimately to remove it. —MOODY v. ALABAMA G. S. R. Co., Ala., 26 South. Rep. 952.

46. EASEMENTS — Light and Air — Abandonment.—Where plaintiff had acquired an easement over defendant's land for the ingress of light and air to a window of his building, he does not surrender such right by tearing down the old building for the purpose of erecting a new one, where it clearly appears from the plans for the new building that a window will be in substantially the same place as was the window of the old building.—CITY NAT. BANK OF SALEM v. VAN METER, N. J., 45 Atl. Rep. 280.

47. EJECTMENT—Lost Deed.—It is competent to prove the execution and contents of a deed by the best evidence of which the nature of the case is susceptible, where it appears that the person claiming under it as a remote grantee never had it in his possession, that it was not in his power to produce it, that he had not disposed of it for the purpose of introducing secondary evidence, and that the record books in which the deed was probably recorded had been destroyed by fire.—HARRELL v. ENTERPRISE SAV. BANK, Ill., 56 N. E. Rep. 53.

48. EQUITY—Accounting—Limitations.—The six years statute of limitations will not be enforced in a court of equity as a bar to an accounting, if the complainant asserts and successfully proves that moneys were collected under an express trust created by him and accepted by the defendant, and where the latter never claimed that he had any ownership in the moneys collected.—CARRARD v. NILES, N. J., 45 Atl. Rep. 266.

49. EQUITY — Pleading — Multifariousness. — A complaint by creditors of a corporation alleging that its officers and directors had wasted and misapplied its assets, and had transferred and removed such assets beyond the reach of the creditors, without consideration, leaving the corporation insolvent, and asking that such transfers be set aside, and that an accounting by such officers be had, and for judgments against the corporation in favor of the creditors, is not multifarious, but states a single cause of action to compel the officers to account for their official conduct and disposition of the corporate funds, though different kinds of relief are sought.—SOUTH BEND CHILLED PLOW CO. v. GEORGE C. CRIBB CO., Wis., 81 N. W. Rep. 675.

50. ESTOPPEL—Pleadings—Inconsistent Positions.—A married woman who joins with her husband in a bill in equity, which is sworn to by her as well as her husband, for relief based upon a lease of her property, which the bill alleges was made by her husband with her consent, after such allegation and the validity of the lease have been admitted by the answer of the defendant, and the cause has proceeded to a hearing upon the issues joined, cannot take the position on such hearing or on a subsequent appeal that the lease is void because not executed by her as required by statute.—BROOKS v. LAURENT, U. S. C. C. of App., Fifth Circuit, 98 Fed. Rep. 647.

51. EVIDENCE—Admissibility—Communications Between Husband and Wife.—Code, § 4607, providing that neither husband nor wife can testify as to communications between them while married, prohibits the wife testifying as to such communications in an action between the appointees of her deceased husband as beneficiaries of his insurance policy.—SHUMAN v. SUPREME LODGE KNIGHTS OF HONOR, Iowa, 81 N. W. Rep. 717.

52. EVIDENCE—Declarations of Deceased Person—Escheated Property.—In an action against the State to recover escheated property of a person who died intestate and without known heirs, declarations of the deceased concerning his past life and history are admissible to identify him as a relative of plaintiffs.—YOUNG v. STATE, Oreg., 59 Pac. Rep. 812.

53. EVIDENCE—Ordinances—Publication.—There must be some declaration in or on, and as a part of, a book or pamphlet, that its publication is by reason of some competent authority to bring it within Rev. St. § 4137, providing that copies of ordinances printed in a book or pamphlet, and purporting to be published by authority, shall be presumptive evidence thereof, and after three years from date of publication the book or pamphlet shall be conclusive evidence of the regularity of the adoption and publication thereof.—QUINT v. CITY OF MERRILL, Wis., 81 N. W. Rep. 664.

54. EVIDENCE—Photographs.—It is within the discretion of a presiding justice to admit in evidence an X-ray photograph. Whether it is sufficiently verified, whether it appears to be fairly representative of the object portrayed, and whether it may be useful to the jury are preliminary questions addressed to him, and his determination thereon is not open to exceptions.—JAMESON v. WELD, Me., 45 Atl. Rep. 299.

55. EXECUTION—Levy on Equitable Interest in Land.—The levy of an execution on land subject to a mortgage is void on its face, as being a levy on an equitable interest in land, and all subsequent proceedings based on such a levy are a nullity.—WILKINS v. JOHNSON, Tenn., 54 S. W. Rep. 1001.

56. EXECUTION SALE—Rights of Purchaser.—A purchaser of property at execution sale on a judgment obtained against one who held the property for the benefit of another, acquired no title thereto, although the deed to such trustee was absolute in form and registered.—COLYAR v. CAPITOL CITY BANK, Tenn., 54 S. W. Rep. 977.

57. FEDERAL COURTS—Jurisdiction—Federal Question.—An action involving the right to accretions along the river front by the owners of lands whose title is derived through a patent, issued pursuant to the provisions of an act of congress, in which the lands are described as "lying on the west bank of the Mississippi river," presents a case for the construction of the grant, and is a question arising under a law of the United States, of which a federal court has jurisdiction.—KING v. CITY OF ST. LOUIS, U. S. C. C., E. D. (Mo.), 98 Fed. Rep. 641.

58. FEDERAL COURTS—Jurisdiction in Equity.—During the time the estate of a testator is in process of administration in a State probate court, and before the executors have rendered any account, a federal court will not entertain a bill in equity by a *cestui que trust* under a trust fund comprising the general residuary estate of the testator to set aside a sale of stocks made by the executors, and to take the proceeds out of their possession, which is, in legal effect, the possession of the probate court, and substitute therefor the property sold.—JORDAN v. TAYLOR, U. S. C. C., D. (Mass.), 98 Fed. Rep. 643.

59. FEDERAL COURTS—Jurisdiction of Suits to Restrain Taxes on Patent Rights.—A suit to enjoin State taxes as illegal because levied in effect on patents or patent rights, is not one "arising under the patent laws," of which the Circuit Court of the United States can take jurisdiction under U. S. Rev. Stat. § 629, cl. 9.—HOLT v. INDIANA MFG. CO., U. S. S. C., 20 Sup. Ct. Rep. 272.

60. FRAUDS, STATUTE OF—Orders—Acceptance.—Defendant had loaned money to the owners of certain lots to make improvements thereon. To secure the mortgaged premises from mechanics' liens, the borrowers deposited funds with an agent of defendant. Plaintiff did some work for contractors whom the borrowers had employed to do the work, and received in payment orders on the agent of the defendant, who verbally accepted them. Held, that defendant was not liable unless it was shown that it or its agent had at the time funds belonging to such contractors, or was in some way indebted to them, as otherwise the acceptance was within the statute of frauds.—WINBURN v. FIDELITY LOAN & BUILDING ASSN., Iowa, 81 N. W. Rep. 682.

61. FRAUDULENT CONVEYANCES—Burden of Proof.—Where a debtor conveys his property to a relative, and his creditor sustains any loss in consequence thereof, such relationship imposes on the parties to the conveyance the burden of showing that the transfer was made in good faith, and for a valuable consideration.—MENDENHALL v. ELWERT, Oreg., 59 Pac. Rep. 805.

62. HIGHWAYS—Opening—Abandonment.—A highway is opened to its full width of two rods on each side of the section line where the county commissioners declare it opened, and the public use it, though only on one side of the section line.—BAKER v. HOGABOOM, S. Dak., 81 N. W. Rep. 780.

63. HOMESTEAD—Alienation by Will.—Const. art. 11, § 11, provides that a homestead in the possession of each head of a family shall inure to the benefit of the widow, and shall be exempt during the minority of the children, etc. Held, that where a testator died, leaving minor children, but no widow, the children were entitled to a homestead in his property, notwithstanding a provision in his will directing that all his property be sold for the payment of his debts.—MCCRAE v. MCCRAE, Tenn., 54 S. W. Rep. 979.

64. HOMESTEAD—What Constitutes a "Family."—Where a debtor is a housekeeper, and a granddaughter dependent on him for support resides with him, he has a "family," within the meaning of the homestead statute.—COLLINS v. GIBSON, Ky., 54 S. W. Rep. 945.

65. HUSBAND AND WIFE—Estate in Entireties—Joint Tenancy.—A deed to a husband and wife which conveys and warrants to them, jointly, the premises, etc., does not create in them an estate in joint tenancy, but one of entireties; the word "jointly" being mere surplusage.—SIMONS v. BOLLINGER, Ind., 56 N. E. Rep. 23.

66. INSURANCE—Waiver of Conditions as to Proofs of Loss.—A stipulation in a contract of insurance that no officer, agent, etc., of the company shall have power to waive any provisions thereof, unless such waiver shall be written upon or attached to the policy and approved by the secretary, does not prohibit the secretary of such company from waiving the condition requiring the insured to furnish proofs of loss.—WASHBURN-HALLIGAN COFFEE CO. v. MERCHANTS' BRICK MUT. FIRE INS. CO., Iowa, 81 N. W. Rep. 707.

67. INSURANCE OF GROWING CROPS—Loss.—The requirement of a policy of insurance against loss to growing corn by hail, that in case of partial loss a true account of the remaining portion shall be kept, is sufficiently complied with, where only part of the tract has been harvested at the time it is desirable to know the amount, by averaging the remainder with that already gathered.—BARRY v. FARMERS' MUT. HAIL INS. ASSN., Iowa, 81 N. W. Rep. 690.

68. INTERPLEADER—Attorney and Client—Interest of Plaintiff.—An attorney's claim for fees against a fund collected is not such an interest therein as will prevent his maintaining a bill of interpleader against divers claimants to the fund, where the claims of some of the parties interpleaded are derived through a common source, and the interests of the plaintiff and the other persons interpleaded are those of agents and attorneys, derived by agreement with those parties, and

the ulterior question is whether the agents are entitled to the fund as against the principals.—McFADDEN v. SWINERTON, Oreg., 59 Pac. Rep. 816.

69. JOINT TORT-FEASORS.—That some of the defendants, in an action in a State court for the wrongful death of plaintiff's intestate on a sailing vessel, made application, as the owners of the vessel, to a federal court, for a limitation of their liability under the United States statutes relating to the merchant marine, and that the federal court enjoined plaintiff from further proceedings in the State court against these defendants, is not a bar to the plaintiff proceeding in such court against the other defendants, where he has received no satisfaction for the wrong complained of.—GRUNDEL v. UNION IRON WORKS, Cal., 59 Pac. Rep. 836.

70. JUDGMENT—Administrator — Removal. — A judgment rendered against an administrator, after his removal from office, is invalid, though rendered during the pendency of an appeal by him from the order of removal.—MORE v. MORE, Cal., 59 Pac. Rep. 823.

71. JURISDICTION—Controversies Between States. — A controversy between two States, of which the Supreme Court of the United States can take original jurisdiction under the constitution, art. 3, § 2, is not created by the enforcement of rules and regulations established by a health officer, which the State has not authorized or confirmed, but which the governor permits to be executed, although he has power to modify or change them, whereby an embargo is put on interstate commerce from another State, with a view to benefit the former State, and one city thereof in particular, at the expense of the other State, and especially of a certain city therein.—STATE OF LOUISIANA v. STATE OF TEXAS, U. S. S. C., 20 Sup. Ct. Rep. 251.

72. LANDLORD AND TENANT—False Representations.—A tenant whose enjoyment and use of the premises is interfered with by the landlord's operating boilers in the basement below, making the floor and walls uncomfortable and unhealthy, may recover damages for breach of covenant of quiet enjoyment, irrespective of misrepresentations in making the lease as to the rooms being comfortable and suitable for the tenant's business.—BOYER v. COMMERCIAL BLDG. INV. CO. Iowa, 81 N. W. Rep. 720.

73. LANDLORD AND TENANT—Lease—Breach of Covenant.—Where, on the making of a lease of certain premises for five years, plaintiff agreed to repair a stable on the premises, and had not done so at the end of the first year, though the improvement was to be made as early as practicable during that year, as the agreement was fully breached at the end of the first year its execution thereafter during the term of the lease was waived.—DEUSTER v. MITTAG, Wis., 81 N. W. Rep. 643.

74. LIBEL—Parties — Misjoinder — Practice. — Where certain defendants are charged with publishing a libel in a newspaper on a certain date, and others with communicating libelous matter on another date, there is a misjoinder of parties and of causes of action.—HAYS v. PERKINS, Tex., 54 S. W. Rep. 1071.

75. LIFE INSURANCE—Premium — Payment — Forfeiture.—Assured executed a note for the premium on his life policy, which declared that it should not operate as a payment, but an extension of time for payment, and that renewal could not be had without a health certificate. Before the second premium became due, insurer refused to accept payment of the note,—claiming the policy forfeited because defendant was unable to furnish such certificate,—whereupon assured did not tender payment of the second annual premium. Held, that there was no forfeiture for failure to tender payment of premium, since such failure was excused by assurer's refusal to accept payment of the note.—GUETZKOW v. MICHIGAN MUT. LIFE INS. CO., Wis., 81 N. W. Rep. 652.

76. LIFE INSURANCE—Right of Insured's Creditors.—General creditors of one who takes out insurance on his life in favor of another, whom he requests to pay certain creditors, have no claim thereon,—at least, beyond premiums paid when he was knowingly insolvent; this not being an assignment to a trustee to prefer creditors.—IN RE SCHAEFER'S ESTATE, Penn., 45 Atl. Rep. 311.

77. LIMITATION OF ACTIONS — Corporations — Stockholders.—Where, in an action to recover upon a stockholder's statutory liability to the depositors of an insolvent bank, the plaintiff sues as assignee of certain depositors who had assigned their respective claims to parties who had assigned them to plaintiff before the commencement of the action, a mistake in describing plaintiff's immediate assignor as the depositor through whom he derives title is not so material as to make the correction by amendment the statement of a new cause of action, which is barred after three years, under Code Civ. Proc. §§ 359, 338, subd. 1, providing that an action against a stockholder must be brought within three years after the liability was created.—NELLIS v. PACIFIC BANK, Cal., 59 Pac. Rep. 830.

78. MASTER AND SERVANT — Negligence of Co-Employees.—Where a railway conductor, standing by a car for the purpose of watching a switch and closing the car door when it was unloaded, was struck and injured by a bundle negligently thrown from the car by co-employees, he was not engaged in "operating, running, riding upon or switching" trains, engines or cars within the meaning of Rev. St. § 1816, subd. 2, providing that a railway employee may recover for injuries inflicted by negligence of co-employees, received while so engaged.—MEDBERRY v. CHICAGO, M. & St. P. RY. CO., Wis., 81 N. W. Rep. 659.

79. MECHANICS' LIENS — Enforcement — Pleadings.—An owner of a mining claim, against whom a judgment has been rendered by default in an action to enforce a mechanic's lien for work done for her lessee, where there is an assignment of error which challenges the regularity of the judgment, is entitled to be heard on appeal, regardless of errors in her proceedings to open the default.—SCHWEIZER v. MANSFIELD, Colo., 59 Pac. Rep. 843.

80. MECHANICS' LIENS—Subcontractors.—A building contract provided that the contractors would not permit any liens to be set up by any subcontractor, or, if any should be set up, would cause them to be satisfied of record. Held, not to prevent the contractors themselves from filing a lien.—ASTE v. WILSON, Colo., 59 Pac. Rep. 846.

81. MINES AND MINING.—To constitute a prior discovery which will support a location of public ground as an oil placer claim under the mining laws, the locator must have actually discovered oil within the limits of the claim. Mere surface indications of the existence of oil therein, however strong, are not sufficient, nor is the existence of oil upon adjoining lands.—NEVADA SIERRA OIL CO. v. HOME OIL CO., U. S. C. C., S. D. (Cal.), 98 Fed. Rep. 673.

82. MORTGAGES—Foreclosure — Crops—Title of Purchaser.—Where the mortgagor of land gives a chattel mortgage on his interest in the growing crop prior to a foreclosure sale of the land, but the crops are not cut till after the foreclosure sale, the title to the crops passes to the purchaser at such sale, since, until there was an actual severance, the crops pass with the title to the soil.—JONES v. ADAMS, Oreg., 59 Pac. Rep. 811.

83. MORTGAGE — Foreclosure under Power.—A mortgagee invested by the mortgage with a power of sale cannot turn over the mortgage to a constable, and delegate to him the power to select the time and place of sale, and make the sale, without the mortgagee's supervision and control. Such a proceeding ignores the principle that the mortgagee must, in making or collecting his debt, protect also the interest of the mortgagor.—GREEN v. STEVENSON, Tenn., 54 S. W. Rep. 1011.

84. MORTGAGES—Priority.—Several mortgagors executed two mortgages at the same time,—one to plaint-

iff and the other to defendant's assignor. Neither of the mortgagees was present at their execution, and all the negotiations in respect thereto were carried on by a third party, as agent, who agreed with the mortgagors that plaintiff's mortgage should be the prior one. The money loaned under plaintiff's mortgage was delivered three days before that of defendant's assignor, but the two mortgages were recorded at the same time. Held, that plaintiff's mortgage was the prior one.—TROMPCZYNSKI v. STRUCK, Wis., 81 N. W. Rep. 650.

85. MORTGAGE — Sale of Property—Assumption of Debt.—Where property is mortgaged for a certain sum, and a portion of it is sold, and the purchaser agrees, as part of the price, to pay the mortgage on the whole property, and thereafter the other portion is sold with a warranty against all incumbrances, on foreclosure of the mortgage the first purchaser is not entitled to have the property last sold exhausted before selling a portion of the property bought by him, and which he claims as his homestead under Rev. St. § 3163, providing that, when part of the mortgaged property not included in the homestead can be separately sold, the homestead shall not be sold until the other mortgaged lands are disposed of.—PERKINS v. MCAULIFFE, Wis., 81 N. W. Rep. 645.

86. MUNICIPAL CORPORATION—Defective Bridges.—In maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where it is situated.—ANDERSON v. CITY OF ST. CLOUD, Minn., 81 N. W. Rep. 746.

87. MUNICIPAL CORPORATIONS—Grant of Franchises—Monopolies.—An ordinance granting a franchise for the construction and maintenance in a city of water and electric light plants for a term of years, and by which the city contracts to pay rental for a certain number of fire hydrants and lights during the term, is not the grant of an exclusive privilege, and does not prevent the city from granting similar franchises to others or making similar contracts with them.—CUNNINGHAM v. CITY OF CLEVELAND, U. S. C. C. of App., Sixth Circuit, 98 Fed. Rep. 657.

88. MUNICIPAL CORPORATIONS — Member of Council—Removal from Ward.—A municipality has power to provide by ordinance that a member of council who removes without his ward shall be deemed to have resigned his office.—STATE v. ORR, Ohio, 56 N. E. Rep. 14.

89. MUNICIPAL CORPORATIONS — Ordinances.—The legislature has power to authorize a city council to establish just and equitable charges for rents for the use of the common sewer; and hence a city ordinance, fixing a uniform rate for metered or unmetered water service for the privilege of tapping a common sewer, is not invalid, as an infringement on the right of trial by jury.—CARSON v. SEWERAGE COMRS. OF CITY OF BROCKTON, Mass., 56 N. E. Rep. 1.

90. NATIONAL BANKS—Assessments on Stockholders—Liability of Pledgee.—A pledgee of stock of a national bank, with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security, without intending to assume liability as a stockholder, cannot be treated as one, and subjected to an assessment, under Rev. St. § 5151, on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt.—WILSON v. MERCHANTS' LOAN & TRUST CO. OF CHICAGO, ILL., U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 688.

91. NEGLIGENCE — Dangerous Premises.—Since the owner of a building is liable for its negligent construction, a complaint alleging that defendant owned and controlled a building which was negligently constructed of improper materials, and which by reason of such construction collapsed and injured plaintiff, is not defective for failure to allege that defendant constructed the building.—WATERHOUSE v. JOSEPH SCHLITZ BREW. CO., S. Dak., 81 N. W. Rep. 725.

92. PARTNERSHIP — Action to Dissolve — Contract.—When a co-partnership is for a term of years, and an action is commenced by one partner against the other to dissolve the same on the ground of misconduct and misbehavior on the part of the defendant in respect to partnership matters, it is not necessary that the latter plead in his answer the commencement of such action, and that he has thereby been damaged, in order to avail himself of a willful wrong and injury perpetrated by defendant in commencing the same.—CORCORAN v. SUMPTION, Minn., 81 N. W. Rep. 761.

93. PARTNERSHIP—Dissolution.—A written agreement of dissolution of a firm, containing full terms of settlement, deliberately executed by the partners, is binding on them, in the absence of fraud or mistake.—HOWARD v. PRATT, Iowa, 81 N. W. Rep. 722.

94. PARTNERSHIP—Settlement Between Partners.—Where a partnership becomes insolvent, and discontinues business, one of the partners, who has been forced to pay, with his individual property, a judgment against the firm, cannot enforce contribution from his co-partner, without a settlement of the partnership affairs between them.—EDDINS v. MENEFEE, Tenn., 54 S. W. Rep. 992.

95. PRINCIPAL AND AGENT.—When a broker undertakes to place insurance for another, it is his duty, in case he is unable to do so, to seasonably notify his principal, but his duty to give such notice does not begin until he has had a reasonable time in which to find out, by the exercise of ordinary diligence, whether or not he can place the insurance.—BACKUS v. AMES, Minn., 81 N. W. Rep. 766.

96. PRINCIPAL AND AGENT—Judgment.—Where an agent employed to invest his principal's money takes a mortgage and forecloses it, taking title after sale in his own name, and a judgment recovered against the agent becomes a lien thereon, the agent becomes liable to the principal for the amount loaned.—MOMSEN v. ATKINS, Wis., 81 N. W. Rep. 647.

97. RAILROAD COMPANY—Employee as Trespasser Upon Track—Negligence.—Where a railroad company posts a sign warning and forbidding, as trespassers, all persons except employees from going upon its tracks, an employee passing along the track while off duty is not a trespasser within the meaning of such warning.—INTERNATIONAL, ETC. R. CO. v. BROOKS, Tex., 54 S. W. Rep. 1056.

98. RAILROAD COMPANY—Guaranty Bonds—Estoppel.—A railroad company, empowered by statute to execute a guaranty of the bonds of another company under certain conditions, and having executed such guaranty, cannot urge its non-compliance with the conditions to defeat its liability thereon, as against *bona fide* purchasers of the bonds.—CENTRAL TRUST CO. OF NEW YORK v. INDIANA, ETC. R. CO., U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 666.

99. RAILROAD COMPANY—Injury to Cattle on Track.—Where a cattle guard on a railway was so filled with sand that there was a path across it that might be readily traveled by cattle, and cattle crossed and were injured on the right of way, the railway company is liable, without regard to what induced the cattle to go there, so long as the owner was not in willful fault.—POTHAST v. CHICAGO, ETC. R. CO., Iowa, 81 N. W. Rep. 693.

100. RAILROAD COMPANY — Negligence — Flying Switches.—The making of a flying switch by a railroad company in its yards in the daytime, and in the usual manner, is not negligence *per se* as to an employee working in the yards, who is familiar with the practice to make such switches therein; and the fact that a safer method might have been adopted affords no ground for a recovery for the death of such employee by being struck by a car so switched, where he was

given notice of its approach.—HUNT v. HURD, U. S. C. C. of App., Seventh Circuit, 98 Fed. Rep. 683.

101. RAILROAD COMPANY—Negligence—Wantonness—Pleading and Proof.—The complaint charging wantonness consisting in a failure to use preventive means on discovery of plaintiff's peril, recovery cannot be had on proof of wantonness consisting in running a train, without proper appliances for stopping it, at a high rate of speed, over a crossing where people were wont to pass in large numbers.—BURKE v. ALABAMA MIDLAND RY. CO., Ala., 26 South. Rep. 947.

102. REPLEVIN—Ownership—Possession.—No recovery can be had by an insolvent's assignee in an action against an execution creditor for claim and delivery, where it is found that the plaintiff is not, and never has been, the owner of the property, and was not entitled to the possession of it, and that none of it was in defendant's possession at the commencement of the action.—KEECH v. BEATTY, Cal., 59 Pac. Rep. 887.

103. SALES—Delivery.—Where the purchaser of seeds refused to accept them, and the seller was obliged to sell to another at a loss, it is the duty of the trial court, in an action to recover such loss, when there is evidence of a market price, and offers higher than the price at which the sale was made, to instruct the jury as to the standard of due diligence in making the sale, and that an unreasonable rejection of the higher offers, or neglect to take advantage of the existing market price, was not consistent with such standard. —GEHL v. MILWAUKEE PRODUCE CO., Wis., 81 N. W. Rep. 666.

104. SET-OFF—Claims Purchased by Defendant After Action Brought.—A defendant may plead as a set-off claims against plaintiff which were purchased after suit was brought.—OVERBY v. WELLS, Ky., 54 S. W. Rep. 955.

105. TAXATION — Occupation Tax — Interstate Commerce.—Acts 1899, ch. 432, § 4, imposing a privilege tax on the agents in the State for laundries located in another State, is not in violation of Const. art. 1, § 8, giving congress the power to regulate interstate commerce, since such a transaction is not commerce.—SMITH v. JACKSON, Tenn., 54 S. W. Rep. 981.

106. TELEGRAPH COMPANY—Delay—Regulations. — A telegraph company may close its office for the nigh delivery of messages at a place where the volume of business does not justify the expense of employing a night messenger.—WESTERN UNION TEL. CO. v. CRIDER, Ky., 54 S. W. Rep. 968.

107. TELEPHONES—Right to Use of Streets—Consent of City.—Under the Code of Virginia (section 1287), which requires the consent of the council of a city or town to authorize the use of its streets by a telegraph or telephone line, a telephone company which acquired the right to erect and maintain its poles and wires in the streets of a city through an ordinance, the terms of which it accepted, is bound by a provision of such ordinance reserving to the council the right to repeal the same at any time, —the repeal to take effect 12 months from its date, and its right to maintain its lines in the streets terminates at the expiration of a year from the date of passage of a repealing ordinance. —SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CITY OF RICHMOND, U. S. C. C., E. D. (Va.), 98 Fed. Rep. 671.

108. TRESPASS TO TRY TITLE—Void Sale Under Execution.—Since a sale of property under execution, made after the return day thereof, is void and vests no title, a party claiming property under such a sale cannot maintain an action of trespass to try title thereto. —SNODGRASS v. RUTHERFORD, Tex., 54 S. W. Rep. 1054.

109. TRIAL—Instructions—Record. — Under Horner's Rev. St. 1897, § 533, providing that all instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record, the appellate court cannot consider alleged errors in the giving or refusal of instructions embraced in the bill of exceptions, but not signed by the trial judge.—MOORE v. COMBS, Ind., 56 N. E. Rep. 35.

110. TRUST—Insane Persons—Guardianship.—Where a trustee is given discretionary power by will to devote, not only the income, but the entire trust estate, for the support of an imbecile beneficiary, a court of equity can direct that a part of the *corpus* of such estate, as well as the income, shall be used for that purpose, if essential.—PLUMMER v. GIBSON, N. J., 45 Atl. Rep. 284.

111. TRUSTEES—Compensation — Attorneys' Fees.—A trustee is entitled to his proper and necessary expenses incurred in the execution of his trust, to be paid out of the trust fund, and attorney's fees are proper expenses whenever it is proper to employ one in the management, care, or protection of the trust estate.—BURNEY v. ATKINSON, Tenn., 54 S. W. Rep. 998.

112. USURY — Pleading.—Payments made upon a loan as usurious interest and as commissions for extensions are to be applied, in an action by the creditor to recover his demand, to the discharge of the original debt. —NUNN v. BIRD, Oreg., 45 Atl. Rep. 808.

113. VENDOR AND PURCHASER—Notice.—The fact that the vendors of a homestead continued to occupy the same did not constitute notice to a broker, who procured a transfer of a lien note executed by the vendee on such homestead, that such vendors still claimed to own the property.—STEPHENS v. SUMMERFIELD, Tex., 54 S. W. Rep. 1038.

114. VENDOR'S LIEN — Purchase-Money Note—Assignment.—Since an assignee of a note given for the purchase price of land, and secured by a vendor's lien thereon, takes no title to the property which the vendor holds in trust for the vendee, such assignee is not entitled to subject the land to the payment of the note, or to enforce such lien after the note is barred by limitations.—FARMERS' LOAN & TRUST CO. v. BECKLEY, Tex., 54 S. W. Rep. 1027.

115. VENDOR'S LIEN—Title—Knowledge of Defects.—Plaintiff, without fraud or misrepresentations as to the title, conveyed land to defendant, subject to a vendor's lien. Defendant conveyed to third parties, and in an action on the lien he alleged that the title which plaintiff had conveyed to him was defective. Held that, before he could avail himself of such defense, he must allege and show that he was ignorant of the defect at the time he purchased, and be able to tender a reconveyance.—MOORE v. VOGEL, Tex., 54 S. W. Rep. 1061.

116. WAREHOUSE RECEIPT — Bailment.—A provision in a storage receipt, issued under section 7646, Gen. St. 1894, that the stored property may be mingled with other property of the same kind, or transferred to other elevators or warehouses, does not confer authority on the warehouseman to sell the property described therein.—STATE v. COWDERY, Minn., 81 N. W. Rep. 750.

117. WILLS—Absolute Gift—Contingent Remainder.—A testator gave his property to his wife, and child or children, "or their heirs," who might be living at his death; but if he and his wife and his child or children should all die, and there should be no heirs of the children, then it should go to certain others named. Held, that "children" were meant by the word "heirs," and that his widow, and daughter, his only child, took his estate absolutely on his death; the contingent estate being dependent on the death of both without issue during his lifetime.—FISHBACK v. JOESTING, Ill., 56 N. E. Rep. 62.

118. WILL—Execution—Attestation.—A last will and testament must be signed by the testator in the presence of the subscribing witnesses, or, if not so signed, the testator must acknowledge to such witnesses that the signature thereto attached is his, or in some other way clearly and unequivocally indicate to them that the will about to be signed by them as witnesses is his last will, and has been signed by him.—IN RE LUDWIG'S ESTATE, Minn., 81 N. W. Rep. 758.